Supreme Court, U.S.
FILED
AUG 4 1997
CLERK

No. 96-1940

In The
Supreme Court of the United States
October Term, 1996

THE JAQUES ADMIRALTY LAW FIRM,

Petitioner,

v.

FEL-PRO INCORPORATED,
FELT PRODUCTS MFG. CO., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Marc L. Fleischaker
Donald C. McLean *
Laurel A. Bedig
Rachel G. Lattimore
ARENT FOX KINTNER PLOTKIN & KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

Counsel for Respondents
Fel-Pro Incorporated and
Felt Products Mfg. Co.

* Counsel of Record

90 pp

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals properly imposed sanctions pursuant to the version of Rule 38 of the Federal Rules of Appellate Procedure in effect at the time the Petitioner's sanctionable conduct and the briefing of the case occurred.

RULE 29.6 STATEMENT

This brief in opposition is filed on behalf of Fel-Pro Incorporated ("Fel-Pro") and Felt Products Mfg. Co. ("Felt Products"). Fel-Pro and Felt Products are not publicly held corporations or publicly held entities. Neither Fel-Pro nor Felt Products is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation or other publicly held entity. Fel-Pro and Felt Products are not related to or affiliated with any publicly held corporations or entities which have a direct financial interest in the outcome of this case.

PARTIES TO THE PROCEEDING

The Respondents

Fel-Pro Incorporated and
Felt Products Mfg. Co.

The Petitioner

The Jaques Admiralty Law Firm

The plaintiff-appellants:

Norman D. Abar, *et al.* and Creighton E. Miller, Administrator for the Estate of Isaac W. Abraham, *et al.*

The defendant-appellees:

AC&S, Inc.
Alfred Conhagen Inc.
The Anchor Packing Company & Coltec Industries Inc.

Aurora Pump Division of General Signal Corp.
The B.F. Goodrich Company
Champion International Corporation
Coffin Turbo Pump, Inc.
Durabla Manufacturing Company
Elliot Company
Everlasting Valve Company
Excelsior, Inc.
Fel-Pro Incorporated
Felt Products Mfg. Co.
The Flintkote Company
General Cable Corporation
The Goodyear Tire & Rubber Company
Green Tweed & Co.
The Home Rubber Company
Indian Head Industries, Inc.
Ingersoll-Dresser Pump Company
James Walker Manufacturing Company
Mortell Company
Norton Company
The Okonite Company
Owens-Corning Fiberglas Corporation
Owens-Illinois, Inc.
PPG Industries, Inc.
Pittsburgh Corning Corp.
Plibrico Co.
Quaker Construction Products, Inc.
The Sherwin-Williams Company
USX Corporation
Vellumoid Inc.
Viking Pump, Inc.
Warren Pumps Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATUTES AND OTHER PROVISIONS INVOLVED . 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

I. THE NINTH CIRCUIT COMPLIED WITH THE VERSION OF RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN EFFECT DURING THE RELEVANT TIME PERIOD. 8

A. The Version of Fed. R. App. P. 38 in Effect at the Time of Petitioner's Sanctionable Conduct and Throughout the Briefing Phase of the Appeal Did Not Require Separate Notice or an Opportunity To Respond. 9

TABLE OF CONTENTS - continued

Page

B. The Ninth Circuit Did Not Abuse Its Discretion in Applying the Earlier Version of Rule 38. 12

1. It Was Not "Just and Practicable" To Apply the Amended Version of Rule 38 to Petitioner's Frivolous Appeal. 12

2. The Ninth Circuit's Application of the Earlier Version of Rule 38 Was an Exercise of Common Sense. 15

II. PETITIONER HAS FAILED TO SHOW ANY REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO THE NINTH CIRCUIT. 17

A. The Ninth Circuit's Decision Comports with Similar Discretionary Determinations Made by Other Circuits. 18

B. This Case Presents No Departure from Prior Ninth Circuit Rulings. 20

C. Petitioner Seeks Only To Delay — Not To Oppose — the Imposition of Sanctions. 22

TABLE OF CONTENTS - continued

Page

III. DUE PROCESS WAS NOT DENIED BECAUSE PETITIONER HAD ADEQUATE NOTICE AND REASONABLE OPPORTUNITY TO RESPOND TO THE IMPOSITION OF SANCTIONS. 23

A. Petitioner Ignored the Threat of Sanctions from Several Sources. 23

B. The Ninth Circuit Complied with the Spirit of the Amended Rule 38 and Accorded Petitioner Sufficient Due Process. 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

83 F.3d 426 (table), 1996 WL 183752,
1996 U.S. App. LEXIS 9900
(9th Cir. Apr. 16, 1996) 1

Abar v. ACandS, Inc., No. 94-55624
(9th Cir. Apr. 16, 1996) ..... *passim*

Abbey v. ACandS, Inc., No. C-93-2813 MHP
(N.D. Cal. Sept. 27, 1993) 24

Abdullah v. ACandS, Inc., 30 F.3d 264 (1st Cir. 1994) .. 25

Acevedo v. ACandS, Inc., No. 93-0629-AH-S
(S.D. Ala. Oct. 28, 1993) 24, 25

Agretti v. ANR Freight System, Inc., No. 89 C 5492,
1994 WL 46670, 1994 U.S. Dist. LEXIS 1433
(N.D. Ill. Feb. 7, 1994) 16, 17

Aguilar v. Sunland Beef Co., 89 F.3d 844 (table),
1996 WL 218188, 1996 U.S. App. LEXIS 11049
(9th Cir. Apr. 29, 1996) 21

In re Allustiarte, 62 F.3d 1425 (table), 1995 WL 460407,
1995 U.S. App. LEXIS 22468
(9th Cir. Aug. 3, 1995) 21

In re American Continental Corp., 102 F.3d 1524
(9th Cir. 1996) 21

In re Becraft, 885 F.2d 547 (9th Cir. 1989) 24

Brown v. ACandS, Inc., No. 2:93-1274
(E.D. Pa. Mar. 18, 1994) 25

Carroll v. Jaques Admiralty Law Firm, 110 F.3d 290
(5th Cir. 1997) 25

Clark v. Central Cartage Co., 73 F.3d 361 (table),
1995 WL 758459, 1995 U.S. App. LEXIS 38820
(6th Cir. Dec. 21, 1995) 19

In re Del Mission Ltd., 98 F.3d 1147 (9th Cir. 1996) 21

Fordjour v. Forties Benefits Insurance Co.,
57 F.3d 1076 (table), 1995 WL 341562,
1995 U.S. App. LEXIS 14446
(9th Cir. June 8, 1995) 21

Gabor v. Frazer, 78 F.3d 459 (9th Cir. 1996) 21

In re Generes, 69 F.3d 821 (7th Cir. 1995),
cert. denied, 117 S. Ct. 81 (1996) 16

Hatch v. Reliance Insurance Co., 758 F.2d 409 (9th Cir.),
cert denied, 474 U.S. 1021 (1985) 10, 24

Hill v. Norfolk and Western Railway Co.,
814 F.2d 1192 (7th Cir. 1987) 11

Hoefler v. Caesars Tahoe, 15 F.3d 1085 (table),
1994 WL 28354, 1994 U.S. App. LEXIS 2420
(9th Cir. Jan. 31, 1994) 27

Hyde v. Van Wormer, 474 U.S. 992 (1985) 11

Julien v. Zeringue, 864 F.2d 1572 (Fed. Cir.),
cert. denied, 493 U.S. 917 (1989) 28

K & T Enterprises, Inc. v. Zurich Insurance Co.,
97 F.3d 171 (6th Cir. 1996) 20

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 15, 16

In re Lund, 83 F.3d 427 (table), 1996 WL 183658,
1996 U.S. App. LEXIS 9756
(9th Cir. Apr. 12, 1996) 21

MacDraw, Inc. v. CIT Group Equipment Financing,
73 F.3d 1253 (2d Cir. 1996) 16

Matter of Bero, 110 F.3d 462 (7th Cir. 1997) 19

McConnell v. Critchlow, 661 F.2d 116 (9th Cir. 1981) .. 24

McDonough v. Royal Caribbean Cruises, Ltd.,
48 F.3d 256 (7th Cir. 1995) 20

Miller v. ACandS, Inc., No. 94-55677
(9th Cir. Apr. 16, 1996) ..... *passim*

Morrissey v. Brewer, 408 U.S. 471 (1972) 28

Nordberg, Inc. v. Telsmith, 82 F.3d 394
(Fed. Cir. 1996) 19

Payne v. Exxon Corp., 73 F.3d 370 (table),
1995 WL 766016, 1995 U.S. App. LEXIS 38376
(9th Cir. Dec. 29, 1995) 21

In re Perry, 918 F.2d 931 (Fed. Cir. 1990) 10

Regal Capital, Inc. v. Valencia, 106 F.3d 408 (table),
1997 WL 31139, 1997 U.S. App. LEXIS 1105
(9th Cir. Jan. 21, 1997) 21

Romala Corp. v. United States, 927 F.2d 1219
(Fed. Cir. 1991) 10, 11

In re Rudnick, 62 F.3d 1423 (table), 1995 WL 460360,
1995 U.S. App. LEXIS 22469
(9th Cir. Sept. 3, 1995) 21

Schroeder v. K & K Insurance Group, Inc.,
70 F.3d 1274 (table), 1995 WL 687663,
1995 U.S. App. LEXIS 34004
(7th Cir. Nov. 16, 1995) 19

Shiloh v. Reader's Digest Association Inc.,
62 F.3d 1425 (table), 1995 WL 465774,
1995 U.S. App. LEXIS 22927
(9th Cir. Aug. 7, 1995) 21

Silva v. Witschen, 19 F.3d 725 (1st Cir. 1994) 16

Simmons v. Allstate Life Insurance Co., 65 F.3d 526
(6th Cir. 1995) 14, 18, 20, 27

Smith v. Ricks, 31 F.3d 1478 (9th Cir. 1994),
cert. denied, 115 S. Ct. 1400 (1995) 10, 24

In re Sovereign Partners, 110 F.3d 70 (table),
1997 WL 160279, 1997 U.S. App. LEXIS 6598
(9th Cir. Apr. 4, 1997) 21

T.G.C. Corp. v. Park, 1997 WL 234614,
1997 U.S. App. LEXIS 10637
(6th Cir. May 6, 1997) 19

Toepfer v. Department of Transportation,
792 F.2d 1102 (Fed. Cir. 1986) 10, 11

Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.,
100 F.3d 942 (table), 1996 WL 20512,
1996 U.S. App. LEXIS 2435
(2d Cir. Jan. 19, 1996) 19

In re Wall, 108 F.3d 340 (table), 1997 WL 74470,
1997 U.S. App. LEXIS 3139
(9th Cir. Feb. 18, 1997) 21

STATUTES

28 U.S.C. § 1332 2

28 U.S.C. § 1404(a) 6

Fed. R. Civ. P. 8(a)(1) 4, 5

Fed. R. Civ. P. 8(a)(2) 4, 5

Fed. R. Civ. P. 11 16

Fed. R. Civ. P. 20 4

Fed. R. Civ. P. 60(b)(6) 5, 6, 7

Fed. R. App. P. 38 ..... *passim*

Fed. R. App. P. 38 (amended 1994) ..... *passim*

Sup. Ct. R. 10 ..... 17, 18, 20

MISCELLANEOUS

Communication from the Chief Justice,
the Supreme Court of the United States,
Transmitting Amendments to the Federal Rules of
Appellate Procedure, H.R. Doc. No. 247,
103d Cong., 2d Sess., 1 (1994) 2, 12, 13

OPINIONS BELOW

The Ninth Circuit's decision that affirmed the District Court's dismissal and imposed sanctions in *Abar v. ACandS, Inc.*, No. 94-55624 (9th Cir. Apr. 16, 1996) (hereafter "*Abar*"), and *Miller v. ACandS, Inc.*, No. 94-55677 (9th Cir. April 16, 1996) (hereafter "*Miller*"), is listed as a "table case" at 83 F.3d 426 (9th Cir. 1996). That decision is reported unofficially at 1996 WL 183752 and 1996 U.S. App. LEXIS 9900. (Pet'r App. 1-6.) The remaining orders of the Ninth Circuit and the orders of the Ninth Circuit's Appellate Commissioner are unreported. (Pet'r App. 7-8, 22-46, 78.)

The opinions of the District Court are unreported. (Resp'ts App. 10ra-17ra, 25ra-28ra; Pet'r App. 47-53.)

STATUTES AND OTHER PROVISIONS INVOLVED

Fed. R. App. P. 38 (amended 1994), as in effect at the time of Petitioner's frivolous appeal to the Ninth Circuit and Respondents' opposition thereto, provided:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Fed. R. App. P. 38 was subsequently amended in 1994 to provide:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to appellee.

Through the Chief Justice's Communication transmitting the 1994 amendment to Fed. R. App. P. 38 to Congress (Resp'ts App. 1ra-5ra), this Court ordered, in pertinent part:

> 2. That the foregoing amendments to the Federal Rules of Appellate Procedure [including that to Rule 38] shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

The actions giving rise to the Petition for Writ of Certiorari were originally filed in the District Court.

STATEMENT OF THE CASE

The *Miller* and *Abar* actions underlying this dispute were initiated in the United States District Court for the Southern District of California on July 27, 1993, pursuant to the admiralty provisions of Article III, section 2 of the Constitution, and based upon diversity of citizenship under 28 U.S.C. § 1332. The *Abar* action was filed on behalf of 994 plaintiffs against 93 defendants. More than 20 pages of the 26-page complaint were required to list the names of the 994 plaintiffs and 93 defendants. The allegations of these 994 plaintiffs were set forth in just four pages of the complaint. The *Miller* action was filed on behalf of the alleged administrator of the estates of 370 decedents against the same 93 defendants. More than eight pages of the 14-page complaint were required to list the names of the 370 plaintiffs and 93 defendants. Again, the plaintiffs'

allegations were set forth in just over four pages of the complaint.[1/]

Both complaints alleged that the defendants manufactured, sold, or supplied "harmful toxins and carcinogens including asbestos and asbestos-containing products" for use aboard vessels and asserted claims for personal injuries arising from plaintiffs' alleged exposure to "the aforestated chemicals and products." (Resp'ts App. 42ra.)

In August 1993, defendants Fel-Pro Incorporated and Felt Products Mfg. Co. (hereinafter collectively referred to as "Fel-Pro" and/or "Respondents") filed a motion to dismiss the complaints in both the *Miller* and *Abar* actions. Thereafter, several additional defendants adopted Fel-Pro's motions and supporting memoranda or filed their own motions to dismiss.[2/]

On September 9, 1993, the District Court issued Orders to Show Cause in *Miller* and *Abar*, setting a hearing at which plaintiffs' counsel, Petitioner herein, would be required to show cause why the cases should be

---

[1/] Except for the names of the plaintiffs, the complaint filed in *Abar* is virtually identical to the complaint filed in *Miller*, which is included herein at Resp'ts App. 29ra-45ra.

[2/] Respondents' motions identified numerous deficiencies in plaintiffs' complaints, including: (1) the failure to establish a basis for subject matter jurisdiction over the claims asserted against the defendants; (2) the failure to establish a basis for personal jurisdiction over the defendants; (3) the failure to provide sufficient factual information to give defendants adequate notice of the claims against them and the grounds for the plaintiffs' claims; and (4) the improper joinder of 994 plaintiffs in *Abar* and 370 decedents in *Miller*.

docketed in that court.[3] (Resp'ts App. 25ra-28ra.) In its Orders, the District Court found that the complaints presented "serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure." (Resp'ts App. 25ra, 27ra.) Following the show cause hearing, which took place on November 1, 1993, the District Court directed the plaintiffs to respond to the Show Cause Orders and the motions to dismiss filed by Respondents and other defendants.

On January 18, 1994, the District Court issued an Order which dropped the claims of all but the first-named plaintiff, Norman D. Abar, in the *Abar* case and the claims of the estates of all but the first-named decedent, Isaac W. Abraham, Sr., in the *Miller* case on the ground that they were improperly joined under Rule 20 of the Federal Rules of Civil Procedure. (Pet'r App. 47-53.) The District Court stated that its Order was without prejudice to any of the 993 dropped plaintiffs or the representatives of any of the 369 dropped decedents filing amended complaints as long as they "satisf[ied] the jurisdictional, pleading, and venue requirements of federal law and the Federal Rules of Civil Procedure." (Pet'r App. 50-51.)

The District Court then dismissed the complaints as to the first-named and remaining plaintiff in each case for failure to comply with the requirements of Fed. R. Civ. P. 8(a)(1) and 8(a)(2). The District Court concluded that the

---

[3] Although the *Abar* case was initially assigned to a different judge, it was subsequently reassigned to District Judge John S. Rhoades, Sr., who already had been assigned to the *Miller* case. The *Miller* and *Abar* cases were later considered by the District Court jointly.

complaints failed to satisfy the requirements of Rule 8(a)(1) because they did not provide a factual basis for the assertion of admiralty jurisdiction. (Pet'r App. 52.) The District Court also held that the complaints failed to meet the threshold requirement of Rule 8(a)(2) that a pleader must set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[4/] (Pet'r App. 52-53.)

On January 31, 1994, the plaintiffs in both actions filed a Motion for Relief from Judgment of Dismissal, pursuant to Fed. R. Civ. P. 60(b)(6), in which they asserted that the District Court should reverse its order dismissing their claims because the statute of limitations would otherwise bar their claims against the named defendants. In their motion, the plaintiffs also requested the transfer of their dismissed claims to the U.S. District Court for the Northern District of Ohio.

On March 14, 1994, the District Court issued an Order denying plaintiffs' motion on the ground that Rule 60(b)(6) did not apply to the January 18, 1994 Dismissal Order because it was a nonappealable interlocutory order. (Resp'ts App. 10ra-17ra.) The District Court also concluded that even if Rule 60(b)(6) did apply to the January 18, 1994 Order, plaintiffs had not shown the existence of the type of "extraordinary circumstances" required under the Rule that would entitle them to the

---

[4/] The January 18, 1994 Order gave first-named plaintiffs Abar and Miller 21 days' leave to amend their complaints to comply with the requirements of the Federal Rules of Civil Procedure. (Pet'r App. 53.) There is no indication in the record, however, that either plaintiff has ever filed or attempted to file an amended complaint in compliance with the District Court's Order.

relief requested.[5] (Resp'ts App. 15ra.) A month later, on April 14, 1994 in *Miller* and April 15, 1994 in *Abar*, Petitioner filed with the Ninth Circuit Notices of Appeal from the District Court's Order denying the Motion for Relief from Judgment.

Plaintiffs filed their appellate briefs with the Ninth Circuit on September 1, 1994,[6] and Fel-Pro filed its opposition briefs on September 28, 1994. Defendant-appellee Owens-Illinois, Inc. filed separate opposition briefs which contained a request for sanctions on October 3, 1994. (Pet'r App. 55, 62.) Plaintiffs' reply briefs, filed on November 1, 1994, did not address the issue of sanctions. In the appeal, plaintiffs contended that the District Court erred in dismissing the complaints and in refusing to transfer the dismissed actions to the U.S. District Court for the Northern District of Ohio.

By Memorandum of April 16, 1996, the Ninth Circuit Court of Appeals upheld the District Court's decision and, in the process, found plaintiffs' appeal to be "frivolous." (Pet'r App. 6.) In so finding, the Ninth Circuit noted that motions for relief under Rule 60(b) are reviewed for abuse of discretion only; the underlying judgment is not subject to review. (Pet'r App. 4.) Plaintiffs' appeal merely repeated their legal arguments

---

[5] The District Court also denied plaintiffs' transfer request on the grounds that there were no causes of action to transfer since the complaints had been dismissed and because the plaintiffs had failed to establish a basis for transfer under 28 U.S.C. § 1404(a). (Resp'ts App. 16ra.)

[6] Plaintiffs' initial opening appellate briefs, filed on August 16, 1994, were rejected by the Ninth Circuit as a result of Petitioner's violation of several Ninth Circuit procedural rules.

made out below, and the Ninth Circuit found that the plaintiffs did not demonstrate any "extraordinary circumstances" which prevented plaintiffs from seeking more timely relief, such as filing a direct appeal. (Pet'r App. 4.) Indeed, the appellate court noted that prior Ninth Circuit law had specifically rejected the type of "extraordinary circumstance" put forth by plaintiffs in support of their claim for Rule 60(b)(6) relief. (Pet'r App. 4-5.) The Ninth Circuit also found that the District Court did not abuse its discretion in refusing to grant plaintiffs' request for transfer because the cases had been dismissed and, therefore, there were no cases left to transfer. (Pet'r App. 5-6.) Furthermore, as a result of the frivolous nature of the appeal, the Ninth Circuit awarded sanctions against the plaintiffs' attorney, Petitioner herein, for attorneys' fees and double costs and directed the Ninth Circuit Appellate Commissioner to "determine the amount of sanctions to be awarded each defendant." (Pet'r App. 6.)

Petitioner challenged the Ninth Circuit's award of sanctions in a Motion to Vacate Summary Imposition of Rule 38 Sanctions, or, in the Alternative, for Statement of Reasons and Opportunity to Respond, alleging that the Ninth Circuit's failure to comply with the amended version of Fed. R. App. P. 38 violated its due process rights. (Pet'r App. 69.) The Ninth Circuit denied the Motion to Vacate on June 7, 1996. (Pet'r App. 77.)

The Ninth Circuit's Appellate Commissioner filed an Order quantifying the amount of sanctions on September 16, 1996. (Pet'r App. 22.) Two weeks later, on September 30, 1996, Petitioner moved for reconsideration of portions of that award, but included no mention of Petitioner's previous Rule 38 challenge. (Pet'r App. 9.) The Ninth Circuit denied Petitioner's motion for

reconsideration on March 6, 1997, and Petitioner now bases the timeliness of its Petition for a Writ of Certiorari upon that denial of reconsideration. (Pet'r App. 7.)

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT COMPLIED WITH THE VERSION OF RULE 38 OF THE FEDERAL RULES OF APPELLATE PROCEDURE IN EFFECT DURING THE RELEVANT TIME PERIOD.

On the days that Petitioner filed the notices of its frivolous appeal with the Ninth Circuit — April 14 and 15, 1994 — the pre-amendment version of Fed. R. App. P. 38 was in effect. Indeed, on the dates that Petitioner filed its opening appellate briefs (September 1, 1994), Respondents filed their opposition briefs (September 28, 1994), and defendant-appellee Owens-Illinois, Inc. filed opposition briefs that included an unequivocal request that Petitioner be sanctioned pursuant to Rule 38 (October 3, 1994), the pre-amendment version of Rule 38 was in effect. The earlier version of Rule 38 was also in effect on November 1, 1994, when Petitioner, ignoring the request for sanctions, completed the briefing of its frivolous appeal by filing reply briefs. Thus, *all* of Petitioner's sanctionable conduct involving the filing and briefing of its frivolous appeal took place prior to the December 1, 1994 effective date of the amendment to Rule 38.

During the time of Petitioner's sanctionable conduct and the briefing of that appeal, separate notice and an opportunity to respond prior to the imposition of sanctions were not required by the Federal Rules of Appellate Procedure, but were merely discretionary with the circuit

courts. The Ninth Circuit exercised its sound discretion not to require separate notice and hearing when the frivolous appeal was filed — and a then proper request for sanctions was made — before the new requirements went into effect.

A. The Version of Fed. R. App. P. 38 in Effect at the Time of Petitioner's Sanctionable Conduct and Throughout the Briefing Phase of the Appeal Did Not Require Separate Notice or an Opportunity To Respond.

Rule 38 of the Federal Rules of Appellate Procedure authorizes an appellate court to impose sanctions in the form of attorneys' fees and costs against a party, like Petitioner, that has filed a frivolous appeal. Fed. R. App. P. 38.

An amendment to the Rule, effective December 1, 1994, now requires a separately filed motion for sanctions or notice from the court and an opportunity to respond before sanctions may be imposed. *Id.* The earlier version of the Rule was more expansive and required no such special notice or opportunity to respond. It provided that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Fed. R. App. P. 38 (amended 1994).

Prior to the 1994 amendment to Rule 38, an appellate court could, in its sound discretion, impose sanctions for a frivolous appeal either *sua sponte* or upon a request by the appellee made in that party's opposition to the appeal. "[D]amages are awarded by the court in its

discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." Fed. R. App. P. 38 advisory committee's note to 1967 adoption. *See also, Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir.) (sanctions need not be sought to be awarded), *cert. denied*, 474 U.S. 1021 (1985). Prior to the 1994 amendment, no separate notice was required before Rule 38 sanctions could be imposed; the mere existence of Rule 38 and precedential case law imposing the Rule were found to provide adequate notice to satisfy due process. In *Romala Corp. v. United States*, 927 F.2d 1219 (Fed. Cir. 1991), the Federal Circuit stated:

> Nor does due process require any specific notice or opportunity for additional briefing or a hearing prior to imposition of Rule 38 sanctions under the circumstances presented here. The due process requirement of adequate notice is satisfied by the elementary principle that "practitioners in this court are expected to know and follow the Federal Rules of Appellate Procedure and the precedents in the court's published jurisprudence," including Rule 38 and our lengthy line of decisions applying it in appropriate cases.

927 F.2d at 1226 (citing *In re Perry*, 918 F.2d 931, 935 (Fed. Cir. 1990)).

Moreover, prior to the 1994 amendment to Rule 38, an opportunity to respond was not required before sanctions could be imposed for a frivolous appeal. *Smith v. Ricks*, 31 F.3d 1478, 1489 (9th Cir. 1994) (imposing sanctions without separate hearing), *cert. denied*, 115 S. Ct. 1400 (1995); *Toepfer v. DOT*, 792 F.2d 1102, 1103 (Fed. Cir. 1986) (to require hearing for assessment of damages

pursuant to Rule 38 "would impose on the opposing party and on the court an even greater burden in dealing with a frivolous appeal and entirely defeat the purpose of Rule 38").

The Seventh Circuit in *Hill v. Norfolk and Western Railway Co.*, 814 F.2d 1192 (7th Cir. 1987), took pains to explain why an opportunity for written or oral explanation was not necessary:

> Where, *as in this and most Rule 38 cases*, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct.

Hill, 814 F.2d at 1201 (emphasis added). *Accord, Romala Corp.*, 927 F.2d at 1226-27. *See also, Toepfer v. DOT*, 792 F.2d at 1103 (Fed. Cir. 1986) (citing *Hyde v. Van Wormer*, 474 U.S. 992 (1985), in which this Court awarded damages under its Rule 49.2 without a hearing).

Based on the foregoing, it is clear that at the time Petitioner filed and briefed its frivolous appeal, Rule 38 afforded Petitioner no right to notice or an opportunity to respond prior to the imposition of sanctions by the Ninth Circuit. Any due process requirements for notice were met by the actual existence of Rule 38 and Petitioner's obligation to know the Rules, the actual notice in Owens-Illinois' briefs, and, as set out *infra* at Section III.A., the fact that Petitioner had been warned about similar

sanctionable conduct by other courts. Any due process requirements for an opportunity to respond were likewise met because Petitioner had a chance to reply to the demand for sanctions which were plainly requested in the Owens-Illinois' briefs, but did not.

B. The Ninth Circuit Did Not Abuse Its Discretion in Applying the Earlier Version of Rule 38.

1. It Was Not "Just and Practicable" To Apply the Amended Version of Rule 38 to Petitioner's Frivolous Appeal.

Petitioner failed to advise this Court in its petition that the version of Rule 38 in effect at the time of Petitioner's frivolous appeal did not require separate notice or an opportunity to respond before the Ninth Circuit could impose sanctions. In fact, Petitioner simply assumes that amended Rule 38 automatically applied to all matters pending on the date of its implementation. This assumption is, however, incorrect. In its transmission to Congress of the 1994 Amendment of Rule 38, this Court ordered:

> 2. That the foregoing amendments to the Federal Rules of Appellate Procedure [including Rule 38] shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter

> commenced and, *insofar as just and practicable*, all proceedings in appellate cases then pending.[7/]

Thus, pursuant to this Court's clear instructions, the Ninth Circuit was not required to apply the 1994 amendment to Rule 38 to the pending appeal in *Miller* and *Abar*. Instead, absent a determination by the appellate court that application of the amended Rule would be "just and practicable," the prior version of Rule 38 was properly applied to the pending appeal.

Petitioner has failed to make any showing that application of the amended version of Rule 38 to its frivolous appeal would be just and practicable.[8/] Nor could such a showing be made. There was no just reason to apply the amended Rule when all of Petitioner's conduct giving rise to the imposition of sanctions took place *prior to* the effective date of the amendment. Similarly, there was no just reason to apply amended Rule 38 to this case when, as set forth *infra* at Section III.A., Petitioner was on notice from numerous federal courts that the filing of claims virtually identical to the claims that were the subject of this appeal was frivolous and/or sanctionable. Moreover, it was not practicable to apply the amended version of the Rule when all briefing by the parties in the *Miller* and *Abar* appeal had been concluded well before the effective date of the amendment. Thus, it was not

---

[7/] *See* Communication from the Chief Justice, the Supreme Court of the United States, Amendments to the Federal Rules of Appellate Procedure, H.R. Doc. No. 247, 103d Cong., 2d Sess., 1 (1994) (the relevant portions of which are included herein at Resp'ts App. 1ra-5ra) (emphasis supplied).

[8/] Indeed, Petitioner has failed to even address the "just and practicable" requirement in its petition.

"just and practicable" for the Ninth Circuit to apply the amended version of Rule 38 to Petitioner's appeal. Indeed, under the circumstances presented here, application of the amended Rule would have worked an *injustice* upon Respondents and the other defendants by forcing them to incur more expense in defending Petitioner's claim that its frivolous appeal was not sanctionable and more delay in receiving the attorneys' fees and costs to which they are entitled.

A single appellate case has discussed whether imposition of the amendment to Rule 38 on a pending appeal that had been fully briefed prior to the effective date of the amendment was appropriate. *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526 (6th Cir. 1995). In *Simmons*, as in *Miller* and *Abar*, the appellate court imposed sanctions after the effective date of Rule 38's amendment for the filing of a frivolous appeal that took place *prior to* the effective date of the amendment. As in *Miller* and *Abar*, appellee's brief contained a request for sanctions, but there had been no separately filed motion or notice from the court.

The *Simmons* court found that the reply brief, which responded to the request for sanctions, evidenced the appellant's notice of the request. Consequently, the court held that separate notice and an opportunity to respond was not necessary before sanctions could be imposed. *Id.* at 531.

In this case, Petitioner was also on notice of the Ninth Circuit's consideration of sanctions through defendant-appellee Owens-Illinois' requests for sanctions in its briefs. (Pet'r App. 58-59, 65-66.) Petitioner's failure to respond to those requests for sanctions should

not be made the basis for according it yet another opportunity to forestall the imposition of sanctions.

2. The Ninth Circuit's Application of the Earlier Version of Rule 38 Was an Exercise of Common Sense.

The Ninth Circuit's imposition of the unamended Rule 38 was an exercise of common sense applied to the facts of a particular case, an exercise in discretion approved by this Court. "Our orders approving amendments to federal procedural rules reflect the common sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994) (citing the "just and practicable" language that usually accompanies this Court's Orders amending Federal Rules).

In *Landgraf*, the issue was whether a substantive amendment to the Civil Rights Act of 1991 should apply to cases arising before its enactment where the statute was silent as to retroactivity. In discussing the general prescription against statutory retroactivity, this Court also commented about the retroactivity of procedural rules. Specifically, this Court stated that "the mere fact that a new rule is procedural does not mean that it applies to every pending case." *Id.*[9] Instead, this Court noted that

---

[9] As an example of a situation in which a new procedural rule would *not* apply to a pending case, this Court stated that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Id.* Similarly, the amendment to Rule 38 should not apply to cases like *Miller* and *Abar* where a request for sanctions had been properly made under the earlier version of the Rule.

courts must employ a common sense approach in deciding whether procedural changes should be applied to pending cases. *Id.* Thus, this Court has left determinations of what constitutes a "just and practicable" application of Rule changes to pending matters to the common sense of each court. This common sense must, necessarily, be applied on a case-by-case basis.

The common sense approach to the application of new amendments to procedural Rules has been applied by federal courts in other contexts. For example, the 1993 amendment to Federal Rule of Civil Procedure 11 was introduced by this Court with similar "just and practicable" language as that used to introduce the 1994 amendment to Fed. R. App. P. 38. In determining which version of Rule 11 to apply to cases pending as of the effective date of the amendment, courts used a common sense approach which typically focused on the version of the Rule in effect at the time of the sanctionable conduct. *See, e.g., In re Generes*, 69 F.3d 821, 826-27 (7th Cir. 1995) (applying the former version of Rule 11 where initial brief filed prior to amendments even though district court's decision and motion for sanctions filed after effective date), *cert. denied*, 117 S. Ct. 81 (1996); *MacDraw, Inc. v. CIT Group Equip. Fin.*, 73 F.3d 1253, 1257 (2d Cir. 1996) ("Because the allegedly sanctionable conduct in this case occurred prior to the effective date of the 1993 amendments, the district court was required to apply the standard of conduct set forth in the pre-1993 Rule [11]"); *Silva v. Witschen*, 19 F.3d 725, 728 (1st Cir. 1994) ("[W]e review the . . . sanction order under the pre-amendment Rule 11 standards in force at the time the sanctioned conduct occurred."); *Agretti v. ANR Freight Sys., Inc.*, No. 89 C 5492, 1994 WL 46670, at *1, 1994 U.S. Dist. LEXIS

1433, at *2-3 (N.D. Ill. Feb. 7, 1994) (applying version of Rule 11 in effect at the time of the sanctionable conduct).

Here, the Ninth Circuit applied its common sense and exercised its discretion not to apply the 1994 amendment to its imposition of sanctions as to conduct that occurred well before the effective date of the amendment to Fed. R. App. P. 38. That decision was just and practicable, and does not warrant review by this Court.

II. PETITIONER HAS FAILED TO SHOW ANY REASON FOR THIS COURT TO GRANT A WRIT OF CERTIORARI TO THE NINTH CIRCUIT.

This Court is well aware of its own considerations governing review on certiorari. *See* Sup. Ct. R. 10. Despite Petitioner's assertions to the contrary, it has presented no compelling reasons to justify this Court's review. The Ninth Circuit's decision not to apply the amended version of Rule 38 to the imposition of sanctions in *Miller* and *Abar* creates no conflict among the circuits; every appeal cited by Petitioner to justify such a conflict was brought or briefed after the 1994 amendment was implemented. Petitioner has failed to cite a single case in which a circuit court required a separate motion for sanctions where a request had been made during briefing that was completed before the amendment went into effect. Neither has Petitioner offered any other compelling reasons to justify review. *See* Sup. Ct. R. 10. A decision by this Court would affect no one but the parties involved and would fail to serve the ends of justice in any way. Rather, it would merely squander this Court's time and resources while delaying the inevitable results of Petitioner's frivolous conduct.

A. The Ninth Circuit's Decision Comports with Similar Discretionary Determinations Made by Other Circuits.

The Ninth Circuit's decision to impose sanctions on Petitioner's frivolous appeal of *Miller* and *Abar* created no conflict among the circuits sufficient to justify review of that decision by this Court. *See* Sup. Ct. R. 10.[10/] The issue in this matter — whether a circuit court properly exercised its discretion not to apply the 1994 amendment to Fed. R. App. P. 38 to a case that had been appealed and fully briefed prior to that amendment's implementation date — has been reached by only one other circuit court. In that action, *Simmons v. Allstate Life Ins. Co.*, the Sixth Circuit reached the same conclusion as the Ninth Circuit did in *Miller* and *Abar*. *Simmons*, 65 F.3d at 531; *see supra* Section I.B.1. In its attempt to create a conflict where none exists, Petitioner has cited, either intentionally or inadvertently, five cases appealed *after* the amendment's implementation date when separate notice and opportunity to respond were required. These cases are irrelevant to the

---

[10/] Sup. Ct. R. 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power.

central issue in this case of whether the Ninth Circuit was correct in imposing sanctions pursuant to the earlier version of Rule 38, in effect at the time of Petitioner's sanctionable conduct and at the time during which the appeal was briefed.[11/]

The remaining three cases on which Petitioner bases its allegation of a conflict among circuits are also immaterial to a review of the propriety of the Ninth Circuit's decision in *Miller* and *Abar*. In each of these cases, courts applied the 1994 amendment to Fed. R. App. P. 38 to appeals filed prior to the amendment's effective date. In two of those cases, however, briefing had not yet been completed by December 1, 1994, and so the parties were not prejudiced by application of the amendment. In one of those cases, *Clark v. Central Cartage Co.*, the Sixth Circuit specifically stated that it did not apply the unamended version of Fed. R. App. P. 38 when briefing had not been completed prior to the Amendment's implementation. That court distinguished its prior decision in *Simmons*: "*Simmons* is distinguishable from the case at bar, because, in this case, the company [appellee] filed its brief after amended Rule 38 became effective." *Clark*, 73 F.3d 361 (table), 1995 WL 758459, 1995 U.S. App. LEXIS 38820, at *9 (6th Cir. Dec. 21, 1995) (appellant brief filed 1/25/95; appellee brief filed 2/24/95). *See*

[11/] *See Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.*, 100 F.3d 942 (table), 1996 WL 20512, 1996 U.S. App. LEXIS 2435 (2d Cir. Jan. 19, 1996) (No. 95-7827); *T.G.C. Corp. v. Park*, No. 96-5638, 1997 WL 234614, 1997 U.S. App. LEXIS 10637 (6th Cir. May 6, 1997); *Matter of Bero*, 110 F.3d 462 (7th Cir. 1997) (No. 96-2828); *Schroeder v. K & K Ins. Group, Inc.*, 70 F.3d 1274 (table), 1995 WL 687663, 1995 U.S. App. LEXIS 34004 (7th Cir. Nov. 16, 1995) (No. 95-1148); *Nordberg, Inc. v. Telsmith*, 82 F.3d 394 (Fed. Cir. 1996) (No. 95-1316).

K & T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171 (6th Cir. 1996) (applying Fed. R. App. P. 38's 1994 amendment to imposition of sanctions where appellate briefs first filed on January 27, 1995). By contrast, in *Miller* and *Abar*, as in *Simmons*, briefing of the case was finished by the time the amended Fed. R. App. P. 38 became effective.

The last case cited by Petitioner was a Seventh Circuit opinion requiring separate notice and opportunity to respond for an appeal briefed prior to December 1, 1994, but that case is also irrelevant to the Ninth Circuit's decision in *Miller* and *Abar*.[12/] Since February 1, 1992, Seventh Circuit Rule 38 (as distinguished from Fed. R. App. P. 38) has required separate notice and an opportunity to respond prior to the imposition of appellate sanctions. *McDonough* was docketed on July 27, 1994, and was thus subject to Circuit Rule 38. In short, no other circuit has acted differently than the Ninth Circuit under similar facts. Rather, the Sixth Circuit, in *Simmons*, made the identical decision. Quite simply, no conflict among the circuits exists.

B. This Case Presents No Departure from Prior Ninth Circuit Rulings.

Petitioner has also asserted that the imposition of sanctions in *Miller* and *Abar* was unprecedented within the Ninth Circuit; that the decision had so far departed from that court's prior rulings so as to justify this Court's supervision. *See* Sup. Ct. R. 10(a). In fact, all but one of the appeals in the Ninth Circuit decisions cited by Petitioner as support for this contention were — like the

---

[12/] *McDonough v. Royal Caribbean Cruises, Ltd.*, 48 F.3d 256 (7th Cir. 1995).

appellate decisions Petitioner cited from other circuits — also filed or briefed *after* the Fed. R. App. P. 38 amendment's implementation date.[13/] Stripped of these irrelevant cases, Petitioner's brief mentions — at the end of a footnoted string cite — a single, unreported Ninth Circuit opinion in which that court applied the amendment to Fed. R. App. P. 38 to an action in which the briefing had been completed before the amendment's implementation date. *In re Rudnick*, 62 F.3d 1423 (table), 1995 WL 460360, 1995 U.S. App. LEXIS 22469 (9th Cir. Sept. 3, 1995) (No. 94-15733; appellant's reply brief filed Aug. 18, 1994). In that case, however, the court applied Fed. R. App. P. 38

[13/] *See Gabor v. Frazer*, 78 F.3d 459 (9th Cir. 1996) (No. 94-17133; appellant brief filed 3/6/95; appellee brief filed 3/30/95); *In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996) (No. 95-35183); *In re Am. Continental Corp.*, 102 F.3d 1524 (9th Cir. 1996) (Nos. 95-15759, 95-16403, 95-16595, 95-16754). *See also, In re Sovereign Partners*, 110 F.3d 70 (table), 1997 WL 160279, 1997 U.S. App. LEXIS 6598 (9th Cir. Apr. 4, 1997) (No. 95-15804); *In re Wall*, 108 F.3d 340 (table), 1997 WL 74470, 1997 U.S. App. LEXIS 3139 (9th Cir. Feb. 18, 1997) (No. 95-55887); *Regal Capital, Inc. v. Valencia*, 106 F.3d 408 (table), 1997 WL 31139, 1997 U.S. App. LEXIS 1105 (9th Cir. Jan. 21, 1997) (No. 95-17249); *Aguilar v. Sunland Beef Co.*, 89 F.3d 844 (table), 1996 WL 218188, 1996 U.S. App. LEXIS 11049 (9th Cir. Apr. 29, 1996) (No. 95-15028); *In re Lund*, 83 F.3d 427, 1996 WL 183658, 1996 U.S. App. LEXIS 9756 (9th Cir. Apr. 12, 1996) (No. 95-55887); *Payne v. Exxon Corp.*, 73 F.3d 370 (table), 1995 WL 766016, 1995 U.S. App LEXIS 38376 (9th Cir. Dec. 29, 1995) (95-35183); *Shiloh v. Reader's Digest Ass'n Inc.*, 62 F.3d 1425, 1995 WL 465774, 1995 U.S. App. LEXIS 22927 (9th Cir. Aug. 7, 1995) (No. 94-56425; appellant's brief filed 11/23/94 ruled "deficient" by the court and appellant refiled opening brief 2/22/95); *In re Allustiarte*, 62 F.3d 1425 (table), 1995 WL 460407, 1995 U.S. App. LEXIS 22468 (9th Cir. Aug. 3, 1995) (No. 94-15739; appellant's reply brief filed 12/22/94); *Fordjour v. Forties Benefits Ins. Co.*, 57 F.3d 1076, 1995 WL 341562, 1995 U.S. App. LEXIS 14446 (9th Cir. June 8, 1995) (No. 94-16484; appellant reply brief filed 12/19/94).

sua sponte; there is no indication that the appellee had moved for sanctions. The Ninth Circuit's decision to provide notice and an opportunity to respond under those circumstances is easily distinguishable from *Miller* and *Abar*, where Petitioner was put on notice of the possibility of sanctions by Owens-Illinois' appellate briefs.

Thus, Petitioner has failed to demonstrate that a single decision exists in which a court has required separate notice and an opportunity to respond where sanctions have been imposed pursuant to an appellee's request and briefing has been completed prior to the implementation of the 1994 amendment to Fed. R. App. P. 38. The Ninth Circuit has not strayed from its prior decisions in this matter, and its determination in *Miller* and *Abar* does not warrant the exercise of this Court's supervisory power. No important matter exists; no compelling reasons for review have been raised. Petitioner merely wants yet another chance to delay the latest consequences of its repeated sanctionable behavior.

C. Petitioner Seeks Only To Delay — Not To Oppose — the Imposition of Sanctions.

Delay, not avoidance, of the Ninth Circuit's award of sanctions could be the only relief this Court could provide to Petitioner, because even with notice and an opportunity to respond to a request for sanctions, Petitioner has no excuse for its sanctionable behavior. In none of the many opportunities given Petitioner to justify the bringing of the frivolous appeal in *Miller* and *Abar* has Petitioner provided an explanation for the bringing of the appeal — not in the appellate Reply Brief, not in the Motion to Vacate Sanctions, not in the Motion for Reconsideration of Sanctions. At no point has Petitioner asserted that notice

of sanctions would have altered its behavior. At no time has Petitioner denied the frivolous nature of the appeal. Rather, Petitioner merely seeks to delay the inevitable imposition of sanctions by the Ninth Circuit through the waste of this Court's resources and the expenditure of time and energy of all parties concerned.

The Ninth Circuit found the appeal of *Miller* and *Abar* frivolous. That court then imposed sanctions. Even if Petitioner were to succeed before this Court on the merits of this dispute, eventually — with yet more notice and yet another opportunity to respond — sanctions will be imposed. This Court should not be made a forum by which Petitioner can delay — but not prevent — payment of sanctions for its frivolous appeal.

III. DUE PROCESS WAS NOT DENIED BECAUSE PETITIONER HAD ADEQUATE NOTICE AND REASONABLE OPPORTUNITY TO RESPOND TO THE IMPOSITION OF SANCTIONS.

A. Petitioner Ignored the Threat of Sanctions from Several Sources.

Petitioner *was* on prior notice from several different sources that sanctions could be imposed by the Ninth Circuit. Specifically, as set forth earlier, the briefs of defendant-appellee Owens-Illinois, in both the *Miller* and *Abar* actions, contained a separate section requesting sanctions that fully set forth authority to support the request. (Pet'r App. 58-59, 65-66.) By means of these repeated requests for sanctions, Petitioner was specifically on notice that sanctions were directly requested.

In addition to the specific notice provided to Petitioner by Owens-Illinois, Petitioner should have been aware of the existence of Rule 38 and the Ninth Circuit's imposition of sanctions pursuant to that Rule. *See, e.g., Smith v. Ricks*, 31 F.3d at 1489 (imposing sanctions without separate hearing); *In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989) (Rule 38 sanctions imposed directly on counsel) (citations omitted); *Hatch v. Reliance Ins. Co.*, 758 F.2d at 416 (awarding double costs and attorneys' fees *sua sponte*); *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) (awarding sanctions pursuant to Rule 38 for frivolous appeal).

Moreover, Petitioner had notice from other courts that it was risking sanctionable conduct by pursuing an appeal of the dismissal of *Miller* and *Abar* to the Ninth Circuit. Indeed, *prior to* the time that Petitioner filed its appeal in *Miller* and *Abar*, several district courts and one appellate court had considered complaints filed by Petitioner that were virtually identical to the complaints filed in *Miller* and *Abar*. In dismissing each one of these actions, these courts made it clear that Petitioner's complaints were meritless and worthy of sanctions. *See Abbey v. ACandS, Inc.*, No. C-93-2813 MHP (N.D. Cal. Sept. 27, 1993) (*sua sponte* dismissing action, virtually identical to those filed in *Miller* and *Abar*, filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Northern District of California, where the complaint was "so abusive that it may well invoke sanctions under Rule 11") (Resp'ts App. 24ra); *Acevedo v. ACandS, Inc.*, No. 93-0629-AH-S (S.D. Ala. Oct. 28, 1993) (dismissing action, virtually identical to those filed in *Miller* and *Abar*, filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Southern District of Alabama, where the complaint was

held to be "an abuse of federal procedures and may well invoke sanctions under Rule 11") (Resp'ts App. 21ra); *see also, Abdullah v. ACandS, Inc.*, 30 F.3d 264, 270 (1st Cir. 1994) (affirming dismissal of action with prejudice, virtually identical to those filed in *Miller* and *Abar*, for Petitioner's failure to abide by district court's order requiring amendment of seriously deficient complaints filed on behalf of 1,000 individuals); *Brown v. ACandS, Inc.*, No. 2:93-1274 (E.D. Pa. Mar. 18, 1994) (dismissing action, virtually identical to those filed in *Miller* and *Abar*, originally filed by Petitioner on behalf of 1,000 individuals in the U.S. District Court for the Western District of Louisiana and holding that Petitioner had received "sufficient notice" of the complaint's deficiencies through "the previous rulings and orders of other district court judges in his similar companion cases") (Resp'ts App. 8ra.)[14/]

In view of the foregoing, it could hardly have come as a surprise to Petitioner that his appeal of the District Court's Dismissal Order in *Abar* and *Miller* would be deemed nothing more than the frivolous appeal of a meritless complaint. Petitioner was clearly on notice that sanctions could be imposed. Nevertheless, Petitioner's reply brief cavalierly ignored the threat of sanctions from other courts for similar conduct and the request for sanctions by Owens-Illinois. Petitioner should not be

---

[14/] Nor was the Ninth Circuit decision the first time that monetary sanctions had been awarded against the Petitioner. *See, e.g., Carroll v. Jaques Admiralty Law Firm*, 110 F.3d 290 (5th Cir. 1997) (affirming district court's award of $7,000 sanction against Petitioner for swearing, threatening, and insulting former client's counsel during deposition).

granted redress by this Court for its own failure to recognize the consequences of its actions.

B. The Ninth Circuit Complied with the Spirit of the Amended Rule 38 and Accorded Petitioner Sufficient Due Process.

Even assuming, *arguendo*, that the Ninth Circuit was required to comply with the terms of amended Rule 38 before imposing sanctions against Petitioner, the spirit of the amended Rule was followed and Petitioner was accorded sufficient due process. The Advisory Committee Notes to the 1994 Amendment state that in the absence of a separate motion requesting sanctions, "notice must come from the court." The Notes continue that "[t]he form of notice from the court and of the opportunity for comment purposely are left to the court's discretion." Thus, the Ninth Circuit had the power to act according to the dictates of its own judgment in deciding the "form of notice" and "form of opportunity for comment."

The "form of notice" chosen by the Ninth Circuit was its Memorandum Disposition of April 16, 1996. The sanctions were then subject to the Appellate Commissioner's determination as to the amount of those sanctions. The Appellate Commissioner's General Order 6.3(e) expressly granted 45 days from entry of the Order in which to file a response to the applications for attorneys' fees and costs. (Pet'r App. 46.) Petitioner therefore expressly had the opportunity in its response to the applications to challenge the attorneys' fees and costs submitted by each of the defendant-appellees.

Furthermore, fourteen days after the Ninth Circuit's Memorandum Disposition, Petitioner filed a Motion to Vacate Summary Imposition of Rule 38 Sanctions or, in the Alternative, for Statement of Reasons and an Opportunity to Respond. In its brief in support of its motion, Petitioner could have explained, but chose not to, why sanctions should not be imposed. Petitioner also filed a Motion for Reconsideration of Portions of the Appellate Commissioner's Order Granting Attorneys' Fees and Double Costs. In that motion — denied by the Ninth Circuit — Petitioner never even mentioned Rule 38.

Thus, Petitioner has had ample opportunity to explain why the request for sanctions should not have been granted, but has never once availed itself of those opportunities. The amended Rule calls for Petitioner to have a "reasonable" opportunity to respond and leaves the form of such opportunity for comment to the court. The Ninth Circuit afforded Petitioner reasonable opportunities for comment, each of which it refused to take. Petitioner has decried the deprivation of its right to be heard on this issue, but has wasted every opportunity to justify its bringing of a frivolous appeal to the Ninth Circuit.

As in *Simmons*, *supra* at 16, the Ninth Circuit's decision to consider the request for sanctions pursuant to the prior version of Rule 38 did not "prejudice the appellant or denigrate the recent amendment to the Rule." *Simmons*, 65 F.3d at 531. The spirit and intent of the requirements of amended Rule 38 that Petitioner be afforded notice and opportunity for comment were fully met. *Accord, Hoefler v. Caesars Tahoe*, 15 F.3d 1085 (table), 1994 WL 28354, at *2, 1994 U.S. App. LEXIS 2420, at *5 (9th Cir. Jan. 31, 1994) (finding it sufficient that spirit and intent of amended Rule 3(c) complied with).

Due process is a "flexible concept and the particular procedural safeguards required will vary depending upon all the circumstances." *Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed. Cir.) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)), *cert. denied*, 493 U.S. 917 (1989). Under the particular facts of this case, Petitioner's rights of due process have been satisfied, and Petitioner's assertions to the contrary are totally without merit.

CONCLUSION

In awarding sanctions, the Ninth Circuit properly applied the version of Rule 38 of the Federal Rules of Appellate Procedure in effect at the time of Petitioner's sanctionable conduct. Petitioner's claims that the Ninth Circuit erred, that a conflict among the circuits exists, and that due process has been denied are all erroneous. This matter is not worthy of further time and attention by this Court, and the Petition for Certiorari to the Ninth Circuit should be denied.

DATED at Washington, District of Columbia, this 4th day of August, 1997.

Respectfully submitted,

ARENT FOX KINTNER PLOTKIN & KAHN
Marc L. Fleischaker
Donald C. McLean*
Laurel A. Bedig
Rachel G. Lattimore
Counsel for Respondents
Fel-Pro Incorporated and
Felt Products Mfg. Co.

* Counsel of Record

APPENDICES

APPENDICES TABLE OF CONTENTS

Page

Appendix A: Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Appellate Procedure, H.R. Doc. No. 247, 103d Cong., 2d Sess., 1 (1994) 1ra

Appendix B: Order of U.S. District Court for the Eastern District of Pennsylvania Dismissing Plaintiffs' Action in *Brown*, March 18, 1994 ..... 6ra

Appendix C: Order of U.S. District Court for the Southern District of California Denying Plaintiffs' Motion for Relief From Judgment of Dismissal and Request for Transfer in *Abar* and *Miller*, March 14, 1994 ... 10ra

Appendix D: Order of U.S. District Court for the Southern District of Alabama Dismissing Plaintiffs' Action in *Acevedo*, October 28, 1993 ..... 18ra

Appendix E: Order of U.S. District Court for the Northern District of California Dismissing Plaintiffs' Action in *Abbey*, September 27, 1993 ..... 23ra

Appendix F: Order of U.S. District Court for the Southern District of California for Petitioner to Show Cause re the Factual and Legal Bases for the Action in *Abar*, September 8, 1993 ..... 25ra

Appendix G: Order of U.S. District Court for the Southern District of California for Petitioner to Show Cause re the Factual and Legal Bases for the Action in *Miller*, September 8, 1993 ..... 27ra

Appendix H: Plaintiffs' Complaint filed in U.S. District Court for the Southern District of California in *Miller*, July 27, 1993 ..... 29ra

APPENDIX A

103d Congress, 2d Session---------House Document 103-247

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE AS ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MAY 2, 1994.—Referred to the Committee on the Judiciary and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1994

Supreme Court of the United States
Washington, D.C. 20543

Chambers of
THE CHIEF JUSTICE

April 29, 1994

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

S/

Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, D C 20515

SUPREME COURT OF THE UNITED STATES

Friday, April 29, 1994

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28. United States Code.

settle a case without his or her client's consent. Certain entities, especially government entities, have particular difficulty obtaining authority to settle a case. The rule requires counsel to obtain only as much authority "as feasible."

Rule 35. Determination of Causes by the Court In Banc

* * * * *

(d) *Number of Copies.* -- The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Committee Note

Subdivision (d). Subdivision (d) is added; it authorizes the courts of appeals to prescribe the number of copies of suggestions for hearing or rehearing in banc that must be filed. Because the number of copies needed depends directly upon the number of judges in the circuit, local rules are the best vehicle for setting the required number of copies.

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals ~~shall~~ determines that an appeal is frivolous, it may, after a separately filed

motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Rule 40. Petition for Rehearing

(a) *Time for Filing; Content; Answer; Action by Court if Granted.*-- A petition for rehearing may be filed

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	)	
This Document Relates To USDC - Western District of Louisiana Charlie J. BROWN, ET AL. Civil Action No. 2:93-1274	)	CIVIL ACTION NO. MDL 875
	)	FILED MAR. 18 1994

ORDER

THIS MATTER came on for hearing the 11th day of March, 1994 at 10:30 AM upon the Court's Show Cause Order. Numerous defendants appeared through counsel; although a response was filed, plaintiffs were not present in person nor were they represented by counsel at the hearing.[1] The Show Cause Order of the Court was precipitated by the filing of

---

[1] Although this Court's Show Cause Order did not create an obligatory appearance by counsel at this hearing, the Court finds it discourteous at best for counsel to not be present or fail to notify the Court of the intent not to appear, particularly following counsel's complaint that the courts have been dismissing his actions sua sponte without notice or an opportunity to be heard. Counsel went on to state in his response to the Show Cause Order: "Fortunately, this Court has afforded these maritime claimants with an opportunity to respond to these misrepresentations and, hopefully, derail the runaway train of erroneous rulings."

numerous motions by the defendants for dismissal of this action or for alternative relief.

This case was initiated by the filing of a lawsuit on August 9, 1993 in the Western District of Louisiana naming 1,000 plaintiffs and 93 defendants. Similar lawsuits with different multiple plaintiffs and the same defendants were filed in the United States District Courts for the Districts of Maryland and Massachusetts, the Northern and Southern Districts of California, and the Southern District of Alabama. In each instance the local district court acted sua sponte to either dismiss the lawsuit or issue a show cause order which, following a hearing, then led to a dismissal order. In the matter before the Court, a similar show cause order had been entered by Judge Trimble on August 16, 1993; however, no hearing was held due to the transfer of the action to the Eastern District of Pennsylvania by the Multidistrict Panel.

The Court has reviewed the Complaint filed in this Action and specifically notes deficiencies relating to jurisdictional factors and individual plaintiff information that normally appear in complaints. The defendants cannot be presumed to respond to a complaint when they are unable to identify which plaintiff is suing them, the injury involved, when and where it occurred. Mylan Laboratories, Inc. v. Akzo, N.V., 770 F.Supp. 1053 (D.Md. 1991). With 1000 named plaintiffs and 93 named defendants, counsel for the plaintiffs was unable to individually identify the plaintiffs and defendants in 4½

pages of pleading, let alone provide a succinct statement of the elements of any single claim.[2]

Furthermore, the 1,000 plaintiffs assert joinder under Rule 20, F.R.C.P.[3], but there is a total failure to identify the facts of the "same transaction, occurrence, or series of transactions or occurrences" as required by Rule 20. There must be a "logical relationship" to meet the test of joinder under Rule 20. Dougherty v. Mieczkowski, 661 F.Supp. 267 (D.Del. 1987). The Court finds no stated relationship to meet this test.

Notwithstanding the concern of several federal courts regarding these identical deficiencies in counsel's other similar cases previously described, there has been no attempt by plaintiffs to amend the Complaint or even to provide this or any Court with the factual information which would sustain this action.

THIS COURT FINDS that the Complaint is deficient of necessary facts and allegations necessary for a Rule 20 joinder; and further,

THIS COURT ALSO FINDS that Plaintiffs' counsel has had sufficient notice of these deficiencies through the motions of the defendants and the previous rulings and orders of other district court judges in his similar companion cases to have

---

[2] In discussing the requirements of Rule 8(a)(2), F.R.C.P., Moore's Federal Practice sets forth: "But the general test remains constant: does the statement of the claim contain the required elements stated plainly and succinctly, and does it give fair notice to the opposite party?"

[3] Paragraph No. 1 of the Complaint commences: "This Complaint is brought under Rule 20 of the Federal Rules of Civil Procedure..."

responded in writing to this Court, to have requested the opportunity to amend the Complaint, or to otherwise have appeared and answered these inquiries regarding such deficiencies.

IT IS ORDERED that the Complaint IS DISMISSED WITHOUT PREJUDICE as to all defendants and that the following restrictions shall apply to any refiling by any of these plaintiffs against any of these defendants:

1. The plaintiff must be specifically identified by social security number and residence (Counsel shall further identify all similar lawsuits involving the same plaintiff).

2. Plaintiff's work history, as it relates to asbestos exposure, shall be set forth in detail.

3. Plaintiff's alleged disease shall be identified AND a medical report or diagnosis of such disease shall be attached to the complaint.

4. Each plaintiff shall require an individual lawsuit.

BY THE COURT

Date: 3/18/94

S/
Charles R. Weiner,
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FILED MAR 14 1994
U.S. DISTRICT COURT
SOUTHERN DISTRICT
OF CALIFORNIA

CREIGHTON MILLER,) Administrator for the Estates of Isaac W. Abraham, et al.) Plaintiff,) v.) AC and S, Inc. et al.,) Defendants)	CIVIL NOS. 93-1119(R) (RCM) & 93-1120(G) (BTM) ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT OF DISMISSAL
NORMAN ABAR, et al.) Plaintiffs,) v.) AC and S, Inc., et al.,) Defendants.)	

The instant actions are before the Court on Plaintiffs' motion for relief from judgment of dismissal, pursuant to Fed. R. Civ. P. 60(b)(6).[1/] Plaintiffs also request the court to transfer the above actions to the United District Court for the Northern District of Ohio. Because Plaintiffs have failed to meet the requirements of Fed. R. Civ. P. 60(b,)(6), their motion is denied, and because Plaintiffs' complaints were previously dismissed, there are no cases to transfer. Therefore the request to transfer is also denied.

I. Facts

A. Procedural History

These cases were brought on July 29, 1993 and August 2, 1993 respectively. In Miller, an administrator for the estates of 370 decedents brought suit against 93 Defendants. In the second complaint, Abar was the first of 994 named Plaintiffs suing the same 93 Defendants named in Miller.

The complaints on their face raised serious questions concerning this Court's jurisdiction, among other matters. There were also problems associated with coordinating the many different requests from Defendants' counsel. Therefore, on September 9, 1993, the Court issued a show cause order, requiring Plaintiffs' attorney to answer various questions concerning the factual and legal bases for the complaints, and staying the proceedings.

Prior to the stay, certain Defendants filed motions to dismiss. The hearing date on those motions was originally set for November 1, 1993.

1/ Pursuant to Southern District of California Local Rule 7.1(d)(1), I find this motion suitable for decision without oral argument.

On September 27, 1993, the Judicial Panel on Multidistrict Litigation issued a conditional transfer order for the above two cases.

On November l, 1993, the Court ordered Plaintiffs' attorney to respond in writing to the show cause order. The response was received on November 22, 1993.

Because this Court was obliged to determine whether these complaints were properly pleaded, and because certain Defendants had already moved to dismiss for defects in the complaints, this Court decided the motions to dismiss previously on file. Those motions, once set for November 1, 1993, were reset for January l8, 1994.

B. Order Granting Motions to Dismiss

On January 18, 1994, this Court issued a two part order. First, it dropped all but the first named Plaintiff in Abar, and the first of Plaintiff's decedents in Miller, for improper joinder under Fed. R. Civ. P. 20. Second, it dismissed the complaints tor failure to satisfy Fed. R. Civ. P. 8(a).

The order expressly stated that it was without prejudice to the dropped Plaintiffs -- or Creighton Miller on behalf of the dropped individual decedents -- instituting suit based on the claims attempted to be set forth in the original complaints, so long as any new filings complied with applicable law. In addition, the remaining Plaintiffs -- Creighton Miller as administrator for the Estate of Isaac W. Abraham and Norman Abar -- were given 21 days leave to amend their complaints to comply with Fed. R. Civ. P. 8.

As a result of this Court's January 18 order, the Multidistrict Litigation Panel vacated its conditional transfer order.

Finally, on January 31, 1994, rather than refiling separate complaints on behalf of the dropped parties, or amending the complaints on behalf of the remaining Plaintiffs, Plaintiffs' counsel filed the instant motion.

II. Discussion

A. Rule 60(b)(6)

Plaintiffs move for relief from judgment of dismissal pursuant to Fed. R. Civ. P. 60(b)(6). The full rule states that

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

As the rule itself reveals, Rule 60(b)(6) is a catchall provision. Its use is infrequent: it is properly invoked "only where extraordinary circumstances prevented a party from

taking timely action to prevent or correct an erroneous judgment." U.S. v. Alpine Land & Reservoir. Co., 984 F.2d 1047, 1049 (9th Cir. 1993), cert denied, 114 S.Ct. 60 (1993). A district court's decision on a Rule 60(b)(6) motion is reviewed under an abuse of discretion standard. Fiester v. Turner, 783 F.2d 1474, 1476 (9th Cir. 1986).

Here the ground of Plaintiffs' motion is that the statute of limitations has run on the claims of all of the Plaintiffs originally named in Abar, and on 108 of the decedents originally named in Miller.

Plaintiffs' motion is denied, for several reasons. First, Rule 60(b)(6) by its terms applies to final orders only. The January 18, 1994 order issued in these cases, however, was not a final order. Ruby v. Secretary of United States Navy, 365 F.2d. 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011 (1967) (stating that dismissal without prejudice is nonappealable interlocutory order, unless it is clear that "the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling Plaintiff to assume that he had no choice but to stand on his complaint").

The January 18, 1994 order dismissed the causes of action without prejudice. It also expressly stated that the dropping of all but the first-named Plaintiff or Plaintiff's decedent was "without prejudice to the dropped plaintiffs -- or Creighton Miller on behalf of the other individual decedents -- instituting suit based on the claims attempted to be set forth in the present Complaints." Hence the order was not final, and Rule 60(b)(6) does not apply.

Second, even if Rule 60(b) applies to the January 18, 1994 order, Plaintiffs have not shown that they are entitled to

the relief which the rule provides. As noted above, relief under Rule 60(b)(6) is available only in extraordinary circumstances. Alpine Land 984 F.2d at 1049. In addition, "relief may not be had where 'the party seeking reconsideration has ignored normal legal recourses.'" Id. (quoting In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989)). Hence "where parties have made deliberate litigation choices, Rule 60(b)(6) should not provide a second chance." Id.

Here there are several facts showing that deliberate litigation choices were made. First, Plaintiffs' counsel concedes that Plaintiffs or Plainfiff's decedents have similar claims pending in the U.S. District Court for the Northern District of Ohio. The fact that there are such cases demonstrates two things: first, Plaintiffs retain some claims; and second, Plaintiffs were indeed able to file properly pleaded, individualized complaints within the period required by the applicable statutes of limitations.

Second, counsel was put on notice concerning the deficiencies of these complaints as early as September 8, 1993, when this Court issued its show cause order. Plaintiffs could have attempted to amend these complaints at that time. Plaintiffs counsel could also have attempted to file amended complaints and separate, properly pleaded complaints on behalf of the dropped parties under the terms of the January 18, 1994 order. In addition, it was the decision of Plaintiffs' counsel to file the complaints in their original, improper form. Finally, subsequent to the January 18, 1994 order, there was the possibility of appeal.

There is a third reason why the Plaintiffs are not entitled to the relief Rule 60(b)(6) provides: courts have held that the fact that a statute of limitations might bar an action

does not, by itself, constitute an extraordinary circumstance under Rule 60(b)(6). Wagner Spray Tech Corp. v. Wolf, 113 F.R.D. 50 (S.D.N.Y. 1986). Since the statute of limitations argument is Plaintiffs' sole ground for relief, it follows that Plaintiffs' motion should be denied.

B. Transfer

Plaintiffs also request that this Court transfer the instant actions to the U.S. District Court for the Northern District of Ohio. The request is denied, for two reasons.

First, because the motion for relief from judgment is denied, and because the complaints in these cases have been dismissed, there are simply no causes of action to transfer.

Second, 28 U.S.C. § 1404(a) governs a motion to transfer. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The moving party bears the burden of demonstrating "by particular circumstances" that transfer is appropriate. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 279 (9th Cir. 1979).

Here Plaintiffs have failed to show by particular circumstances that transfer is appropriate. In particular, they have not given any indication that transfer will serve the convenience of parties and witnesses. More important, transfer would add to rather than alleviate the cost to litigants and the expenditure of judicial resources.

III. Conclusion

For the above reasons, the motion for relief from judgment and the request for transfer are denied.

IT IS SO ORDERED.

Date: 3/14/94

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RUBEN L. ACEVEDO, et al.)		
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 93-0629-AH-S
ACandS, INC., et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on the filing of this action by approximately 1,000 plaintiffs against 93 defendants. [Doc. #4.] The claims are for injury and/or wrongful death of each of the plaintiffs, who are alleged to have suffered a host of diseases and injuries as a result of exposure to asbestos and asbestos-containing products on 9,824 different vessels. No attempt to file this complaint as a class action has been made.

For the following reasons, Plaintiffs' complaint is dismissed without prejudice.

I. SUBJECT MATTER JURISDICTION

Plaintiffs allege admiralty jurisdiction as the basis for this action; the complaint also alleges diversity jurisdiction for some plaintiffs.

This Court has no diversity jurisdiction in this case. In order to create diversity, 28 U.S.C. § 1332 requires the matter be between citizens of different states. The language of that statute was interpreted to mean there must be "complete diversity" in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also, e.g., Carden v. Arkoma Assocs.*, _____ U.S. _____, 110 S. Ct. 1015 (1990). "Complete diversity" means that *every* plaintiff must be of diverse citizenship from *every* defendant. 1 Moore's Federal Practice ¶ 0.71[5.-2]. Exhibits A-I and A-II clearly show there is no complete diversity in this action; therefore, the Court has no diversity jurisdiction over this matter.

This Court has no admiralty jurisdiction in this matter. In their "Response and Memorandum to Order to Show Cause," Plaintiffs state

> [i]t is axiomatic that a seaman's product liability claims are governed by the general admiralty and maritime law. Specifically Plaintiffs' Counsel relies upon *Sheffield v. Owens-Corning Fiberglass*, 595 So. 2d 443 (Ala. 1992) to invoke the federal maritime law.

Response and Memorandum at p. 3. Plaintiffs' Counsel's reliance is misplaced; such product liability claims are *not*, in

this Circuit, governed by admiralty and maritime law.[1/] Federal maritime jurisdiction does not extend to personal injury and products liability claims brought by former seamen who were allegedly exposed to asbestos on a vessel. *Cochran v. E.I. duPont de Nemours,* 933 F.2d 1533, 1535 (11th Cir. 1991), *cert. denied,* _____ U.S. _____, 112 S. Ct. 881 (1992). Such an exercise of admiralty jurisdiction would not advance the policies behind a uniform federal law of admiralty. *Id.*

Plaintiffs have alleged no other grounds to invoke the subject matter jurisdiction of this Court; therefore, the cause is due to be dismissed for lack of subject matter jurisdiction.

III. IMPROPER JOINDER

Federal Rule of Civil Procedure 20 governs the permissive joinder of parties. Plaintiffs claim the joinder of the approximately 1000 plaintiffs in one action is proper under Rule 20. That rule provides the following (in pertinent part):

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all these persons will arise in the action.

1/ Decisions of state courts on admiralty questions are not binding authority on this Court.

Plaintiffs, in the introduction to their complaint, allege that "1,000 individual Plaintiffs of the United States Merchant Marine who served aboard 9,824 ships *in toto* as crewmembers comprising 68,434 separate sea voyages spanning contemporary seafaring careers to the year 1990, averaging 44 divers ships per Plaintiff who sailed to multiple ports-of-call throughout the world . . ." In light of these allegations (which Plaintiff cannot now dispute), it is inconceivable that the 1,000 plaintiffs assert any right to relief "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." This action, therefore, is due to be dismissed without prejudice under Fed. R. Civ. P. 20(b) in order to prevent delay and prejudice.

IV. ABUSE OF PROCESS

This complaint is an abuse of federal procedures and may well invoke sanctions under Rule 11, which the Court may impose on its own motion. Fed. R. Civ. P. 11. There is no subject matter jurisdiction; Plaintiffs' sparse factual allegations cannot support the joining of 1000 plaintiffs; and Plaintiffs cannot avoid payment of the separate filing fees[2/] and venue requirements by filing a single action that is really 1000 separate actions.

The Court intends to spare the judicial system and defendants from the plethora of papers and motions for sanctions likely to ensue such an improper pleading by *sua sponte* dismissal of this action without prejudice to the

---

2/ Plaintiffs have paid the required $120.00 filing fee for a civil action; if these actions were properly filed separately, the filing fees could be as much as $120,000.00.

plaintiffs each filing separate actions in the appropriate courts against the proper defendant or defendants. For the foregoing reasons, Plaintiffs' Complaint is **DISMISSED WITHOUT PREJUDICE.**

DONE this 28th day of October, 1993.

S/
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JACK L. ABBEY, et al.,	)	NO. C-93-2813 MHP
	)	
	)	
Plaintiffs,	)	**ORDER**
	)	
—vs .—	)	
	)	
ACandS INC., ACMC f/k/a NATIONAL GYPSUM, COMPANY, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

Plaintiffs have filed this action asserting the claims of approximately 1,000 plaintiffs against 93 defendants. The claims purport to be in admiralty and are for injury and/or wrongful death of each of the plaintiffs who are alleged to have suffered a host of diseases and injuries as a result of exposure to asbestos and asbestos-containing products.

The allegations of the complaint are contained in a little over four pages. The caption takes up 21 pages. Nowhere in the complaint is there any attempt to show how these various injuries or deaths are related to the same transaction or occurrence. The complaint is totally devoid of any basis for joinder or any allegations showing how each defendant is liable to each plaintiff.

The complaint is an abuse of federal procedures and rules governing joinder and pleading requirements under Federal Rules of Civil Procedure 9(b), 19 and 20. Indeed, it is so abusive that it may well invoke sanctions under Rule 11. Plaintiffs' counsel cannot under any stretch of legal imagination, let alone competent pleading practice, file a single action joining all of these parties on the sparse allegations of this complaint. Nor can plaintiffs avoid the separate filing fees, venue and, perhaps, jurisdictional requirements by filing a single action that is really 1,000 separate actions.

The court intends to spare the judicial system and defendants from the plethora of papers, and motions for sanctions, likely to ensue such an improper pleading by sua sponte dismissal of this action without prejudice to the plaintiffs each filing separate actions in the appropriate court against the proper defendant or defendants. If any of these actions are filed in this court, plaintiffs' counsel shall associate local counsel who is a member of the bar of this court before proceeding any further.

Therefore,

IT IS HEREBY ORDERED that this action is DISMISSED without prejudice in accordance with the foregoing.

IT IS SO ORDERED.

DATED: SEP 27 1993

S/
MARILYN HALL PATEL
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NORMAN ABAR, et al.,)	CIVIL NO. 93-1120(G)
)	(BTM)
)	
Plaintiffs,)	ORDER TO SHOW
)	CAUSE RE:
v.)	FACTUAL AND LEGAL
)	BASES FOR THE
)	INSTANT ACTION AND
AC and S, Inc., et al.,)	STAYING THE
)	PROCEEDINGS
)	
Defendants.)	
_____)	

The complaint in this matter presents on its face serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure.

Additionally, it appears that the instant action is possibly appropriate for transferal by the Multidistrict Litigation Panel.

Therefore it is ordered that Alan Kellman, the attorney who signed this petition, appear, either in person or telephonically, before the undersigned Judge at 10:30 a.m. on November 1, 1993, to show cause why this action should be docketed in this Court. Mr. Kellman should demonstrate,

inter alia, the factual and legal basis for his contentions: (1) that counsel actually represents the 994 individuals designated as Plaintiffs and identified by what appears to be their social security numbers; he should also indicate whether they are properly joined pursuant to Rule 20 of the Federal Rules of Civil Procedure; (2) that the named Defendants are amenable to the jurisdiction of this Court; (3) that venue is proper in this district; (4) that the instant action is not an action that may properly belong in the United States District Court for the Eastern District of Pennsylvania, before the Honorable Charles R. Weiner, in accordance with 28 U.S.C. § 1407; and (5) that the instant action is not one already subject to transferal by the Multidistrict Litigation Panel.

In addition, because there are 93 Defendants in the instant action, and because there are numerous problems involved in coordinating the litigation should it remain in this District, this Court stays all proceedings until 30 days after the order this Court will issue subsequent to the November 1 hearing. The Clerk of the Court for the Southern District of California is ordered not to accept filings in the instant action until the stay is lifted.

IT IS SO ORDERED.

Date: 9/8/93

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CREIGHTON MILLER, et al., Plaintiffs, v. AC and S, Inc., et al., Defendants.	CIVIL NO. 93-1119(R) (RCM) ORDER TO SHOW CAUSE RE: FACTUAL AND LEGAL BASES FOR THE INSTANT ACTION AND STAYING THE PROCEEDINGS

The complaint in this matter presents on its face serious questions regarding not only the jurisdiction of this Court, but whether this Court has any connection with the claims and whether there has been compliance with the Federal Rules of Civil Procedure.

Additionally, it appears that the instant action is possibly appropriate for transferal by the Multidistrict Litigation Panel.

Therefore it is ordered that Alan Kellman, the attorney who signed this petition, appear, either in person or telephonically, before the undersigned Judge at 10:30 a.m. on November 1, 1993, to show cause why this action should be docketed in this Court. Mr. Kellman should demonstrate, inter alia, the factual and legal basis for his contentions: (1)

that counsel actually represents the 370 individuals designated as Plaintiffs and identified by what appears to be their social security numbers; he should also indicate whether they are properly joined pursuant to Rule 20 of the Federal Rules of Civil Procedure; (2) that the named Defendants are amenable to the jurisdiction of this Court; (3) that venue is proper in this district; (4) that the instant action is not an action that may properly belong in the United States District Court for the Eastern District of Pennsylvania, before the Honorable Charles R. Weiner, in accordance with 28 U.S.C. § 1407; and (5) that the instant action is not one already subject to transferal by the Multidistrict Litigation Panel.

In addition, because there are 93 Defendants in the instant action, and because there are numerous problems involved in coordinating the litigation should it remain in this District, this Court stays all proceedings until 30 days after the order this Court will issue subsequent to the November 1 hearing. The Clerk of the Court for the Southern District of California is ordered not to accept filings in the instant action until the stay is lifted.

IT IS SO ORDERED.

Date: 9/8/93

S/
JOHN S. RHOADES, SR.
UNITED STATES DISTRICT JUDGE

APPENDIX H

LEONARD C. JAQUES
Alan Kellman (#92442)
Maritime Asbestosis Legal Clinic
1570 Penobscot Building
Detroit, MI 48226
(313) 961-1080

FILED JULY 27 1993
US DISTRICT COURT OF
CALIFORNIA

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Creighton E. Miller, Administrator of the Estate of :

Isaac W. Abraham, Sr. (DOD 10/18/92) (181-20-7879)
Joe C. Adams (DOD 09/19/92) (246-22-1872)
Francisco Agosto (DOD 03/15/91) (084-22-5340)
Norman L. Aikman (DOD 09/06/92) (068-01-0281)
William Aldridge, Jr. (DOD 08/17/91) (354-14-1358)
Knowlton Allen (DOD 01/06/92) (258-30-1581)
Leon R. Allie (DOD 03/03/91) (534-26-6938)
John A. Anderson (DOD 12/20/91) (438-48-6134)
Scott E. Anderson (DOD 09/20/90) (296-14-0197)
Tyree E. Anderson (DOD 11/17/90) (569-16-8687)
William O. Anderson (DOD 06/22/91) (531-10-3963)
Pedro M. Angoco (DOD 07/22/91) (553-52-7965)
Angel Aponte Martinez (DOD 01/18/91) (428-40-4387)
Louis L. Arena (DOD 06/12/91) (437-05-9950)
Gene L. Armstrong (DOD 09/21/91) (500-18-0145)
Robert A. Art (DOD 07/17/92) (566-01-1232)
Edward M. Aubuchon (DOD 02/01/91) (489-26-9964)
Octave A. Auguste (DOD 08/31/90) (127-22-3180)
Guillermo B. Baez, Sr. (DOD 06/12/92) (286-26-2595)

Lloyd R. Baker (DOD 06/25/91) (454-18-3578)
Andres Banuchi (DOD 12/14/90) (092-07-4032)
George D. Barnes, Sr. (DOD 03/03/92) (307-14-0621)
Andrew M. Barnett (DOD 10/07/90) (443-14-0957)
Anthony J. Baroni (DOD 07/06/91) (438-07-1533)
Alton L. Beals (DOD 09/05/91) (239-07-8314)
Joao A. Belchior, Jr. (DOD 08/02/91) (129-14-7181)
Charlie P. Benson (DOD 07/08/91) (249-18-1371)
Allan F. Berlund (DOD 10/13/90) (547-26-1910)
Ferdinand Bernard (DOD 02/12/91) (437-12-4105)
James Berry (DOD 04/11/91) (462-40-8414)
Clarence W. Beverly (DOD 09/28/90) (262-24-1958)
Dalzell Beverly (DOD 06/16/91) (265-32-4178)
Harry A. Bishop, Sr. (DOD 08/30/92) (237-12-7951)
William R. Blecker (DOD 10/16/90) (535-16-9143)
Ronald R. Bloomquist (DOD 01/27/93) (381-16,8059)
Edward W. Bogden (DOD 01/24/91) (179-12-7186)
J.B. Booker (DOD 01/29/92) (450-48-9935)
Warren J. Boston (DOD 01/19/92) (421-16-6310)
Elijah Boyd (DOD 11/20/91) (439-16-7036)
Robert L. Bradford, Jr. (DOD 10/24/92) (217-05-2036)
James R. Bradley (DOD 11/09/91) (418-12-1132)
Creighton J. Brady (DOD 06/27/92) (261-05-7625)
Daniel G. Brennan (DOD 04/17/92) (389-50-1714)
Howard Brigman (DOD 09/08/91) (240-18-3673)
Henry P. Brown (DOD 03/26/91) (555-28-1610)
Lester Brown (DOD 04/08/91) (526-07-7760)
Clarence Brown, Sr. (DOD 08/18/92) (435-28-3937)
William Brown (DOD 01/17/91) (261-05-3096)
Roy J. Bru (DOD 10/09/90) (421-16-9550)
Adam Burghardt (DOD 10/24/90) (523-22-1189)
Charles E. Burns (DOD 09/01/90) (264-12-8824)
Earl M. Burris (DOD 10/11/90) (705-12-6795)
Walter G. Butterton (DOD 01/01/91) (224-20-8023)
Manuel Cabrera Ramos (DOD 09/01/90) (084-22-1649)

Benigno U. Calban (DOD 09/25/91) (575-03-0893)
Frank L. Calvin (DOD 10/12/91) (127-22-5028)
John G. Campbell (DOD 03/26/92) (569-40-0987)
Joseph B. Campbell (DOD 03/29/92) (198-05-0439)
Esteban Canales (DOD 11/24/91) (127-22-5437)
Theodore J. Canonge, Jr. (DOD 03/05/92) (434-32-0661)
Alfredo E. Cardenas (DOD 02/23/91) (131-03-1603)
David T. Carr (DOD 03/10/92) (099-16-2929)
Robert P. Carry (DOD 09/27/90) (166-12-8940)
Robert G. Carter, Sr. (DOD 10/07/90) (252-18-4567)
Harry M. Cartwright (DOD 08/23/92) (481-14-0473)
Eduardo Casas (DOD 02/26/91) (108-18-2132)
Paul E. Cassidy (DOD 01/27/91) (401-24-9562)
Ernesto A Castillo, Sr. (DOD 04/10/92) (080-20-1274)
Carter C. Chambers (DOD 09/15/92) (573-03-9989)
Francis Chapman (DOD 04/30/91) (086-12-2302)
Herbert C. Chattom (DOD 07/29/92) (421-20-5348)
Ken Nien Chen (DOD 01/02/91) (065-22-3955)
Bing Hong Chin (DOD 11/05/90) (078-20-4920)
Sterling Chin (DOD 01/26/91) (438-26-5696)
Eddie J. Christy (DOD 08/20/91) (386-32-7153)
Bernard J. Clark (DOD 11/18/91) (588-20-7872)
Victor A. Claudio (DOD 08/20/91) (119-22-3501)
John H. Cline (DOD 12/17/90) (561-38-2307)
Billy W. Connett (DOD 03/22/92) (374-14-9607)
Peter J. Corvia (DOD 11/08/90) (551-28-9735)
Harold H. Coulter (DOD 08/03/91) (505-20-3514)
Robert J. Cranston (DOD 03/03/92) (037-16-1674)
James W. Cross (DOD 10/11/90) (210-22-6054)
Percy Cruikshank, Jr. (DOD 10/30/90) (568-30-1416)
Armando Cruz Berrios (DOD 02/27/92) (061-24-5372)
Edward R. Culp (DOD 05/10/92) (263-12-7162)
Maurice F. Culp (DOD 04/28/91) (164-12-2687)
Silas Cummings, Sr. (DOD 05/28/92) (436-10-6898)
Harry J. Curtin (DOD 11/11/90) (136-16-4000)

Manuel Da Cruz (DOD 02/02/91) (119-22-1918)
Floyd E, Dare (DOD 01/30/92) (564-20-2563)
Clarence Davis (DOD 02/18/91) (264-58-4961)
Rene De Bellaistre (DOD 09/17/90) (105-22-4400)
Ricardo Deas (DOD 10/01/90) (260-18-5828)
Jose DeOliveira (DOD 11/02/91) (084-18--3158)
Daniel S. DeShields, Sr. (DOD 07/23/91) (064-09-0572)
John W. DeVaux, Sr. (DOD 03/18/91) (213-07-0827)
Clyde A. Dickie (DOD 01/16/92) (014-22-5115)
Chin Do Yee (DOD 11/12/90) (027-16-1727)
Pablo P. Dolendo (DOD 02/18/91) (097-18-8026)
Sidney L. Dolese (DOD 08/09/90) (436-18-9663)
Angelo H. Donisi (DOD 12/28/90) (148-14-6446)
Dave Douglas (DOD 03/16/91) (257-10-7972)
Cornelius J. Downey (DOD 02/15/91) (111-10-6658)
James M. Dunker (DOD 06/06/91) (249-20-4410)
Norman G. Ebanks (DOD 11/01/91) (094-24-6763)
Anders I. Ellingsen (DOD 04/16/91) (460-46-9112)
Theodore Elmore (DOD 01/04/92) (218-01-5920)
John W. English (DOD 08/19/90) (031-16-2972)
Alfred C. Ethridge (DOD 01/01/91) (423-30-9511)
Elegy L. Etter, Sr. (DOD 02/19/92) (450-16-6366)
Julio Evans De La Cruz (DOD 08/08/90) (051-18-3819)
James Evans (DOD 04/01/92) (251-34-3625)
Louis B. Evelyn (DOD 09/14/90) (081-14-0970)
Laurenco Fernandez Pereida (DOD 12/24/91) (063-30-6977)
Harriet A. Figueroa (DOD 03/06/91) (089-22-7367)
Ralph E. Fitzpatrick (DOD 09/19/90) (224-01-8983)
Hugh J. Fitzpatrick, Sr. (DOD 05/21/92) (019-14-6707)
Boniface Fontenelle (DOD 12/09/91) (119-22-2141)
George R. Fortes (DOD 09/12/90) (031-14-8432)
Harold R. Foster (DOD 11/13/90) (058-14-9369)
Edward E. Fowler (DOD 07/21/91) (246-38-5338)
Charles H. Gaboury (DOD 07/11/92) (541-14-2801)
Joseph Gallardo (DOD 09/13/90) (063-20-5664)

Roberto Gamundi (DOD 11/19/92) (436-60-5518)
Jesus Garcia Fernandez (DOD 09/20/90) (265-14-2502)
Tomas Garcia (DOD 08/20/92) (055-22-2099)
Dedrick Garthus (DOD 12/12/91) (470-09-2600)
John Gasowski (DOD 11/04/90) (054-18-4215)
Paul J. Gaydos (DOD 04/02/91) (190-05-5889)
Warren E. George (DOD 10/06/91) (439-54-4395)
Cecil Gilbert, Sr. (DOD 04/06/92) (460-10-9295)
Harold G. Gohl (DOD 05/10/92) (386-26-6930)
Miguel Gonzalez Lopez (DOD 02/20/91) (073-12-6459)
Zannie E. Goode (DOD 02/16/92) (418-18-9010)
Cornelius J. Gordon (DOD 11/20/90) (457-16-9586)
George C. Gordon (DOD 07/11/91) (558-03-7274)
Charles Gottshalk (DOD 09/01/91) (129-12-0692)
Leon J. Green (POD 12/04/90) (547-16-2346) .
Gene Greer (DOD 08/17/90) (533-03-7096)
Jose Guerrero (DOD 11/30/91) (119-22-8954)
Juan G. Gutierrez (DOD 01/09/92) (458-22-8846)
Roy Hadley, Sr. (DOD 04/15/91) (451-22-6487)
Arthur D. Haines (DOD 07/25/92) (391-24-0535)
Roberto Hannibal (DOD 05/14/91) (075-22-8083)
Bror E. Hanson (DOD 04/25/92) (134-24-1495)
Willie C. Harrell, Jr. (DOD 02/04/92) (231-01-5553)
William R. Harrell (DOD 02/11/92) (244-20-2832)
Burley G. Harris (DOD 07/29/90) (550-14-0836)
Cecil Harris (DOD 11/22/91) (452-26-1564)
John O. Harris (DOD 01/18/91) (223-32-3150)
Thomas S. Harris, Jr. (DOD 09/15/91) (226-16-7495)
Thomas C. Harris, Sr. (DOD 08/07/91) (222-05-1990)
Willie S. Harris (DOD 04/25/92) (261-32-8980)
Ashton M. Harrison, Sr. (DOD 09/23/90) (128-20-9389)
Clarence A. Hartnett (DOD 05/4/92) (024-14-0995)
Eugene F. Hathy (DOD 09/05/91) (268-01-3739)
John H. Haus (DOD 06/18/91) (109-12-4402)
Calvin C. Hayes (DOD 09/01/90) (423-64-7333)

Solomon N. Hayes (DOD 12/16/91) (232-30-0642)
James F. Haynes (DOD 07/28/91) (535-16-6446)
Leon S. Haynes (DOD 10/24/90) (266-10-4210)
Charles Helmstetter (DOD 04/26/91) (437-32-8580)
James B. Hendricks (DOD 10/12/91) (424-14-0501)
George Hendrix (DOD 12/15/91) (213-14-3698)
Sergesman N. Hendrix (DOD 08/24/90) (424-30-3592)
Warren J. Henry, Jr. (DOD 03/11/91) (433-40-3338)
Frank Hernandez Lozada (DOD 06/12/91) (217-14-0305)
Homer Hernandez (DOD 02/01/91) (063-22-0375)
Ralph A. Hernandez (DOD 10/14/91) (086-16-2002)
Irvine Herne, Jr. (DOD 08/ll/90) (249-30-4501)
Isadore J. Hiller (DOD 12/19/91) (219-01-6465)
Edwin G. Hohman (DOD ll/26/92) (483-16-6932)
William G. Holley (DOD 04/05/91) (462-48-3769)
Carl N. Holm (DOD 12/22/91) (483-10-5638)
Wayne J. Holman (DOD 02/16/91) (280-12-0324)
Frederick M. Hopkins (DOD 09/12/91) (401-26-7161)
Arne W. Hovde (DOD 10/13/92) (219-16-3321)
Joseph E. Howe (DOD 05/21/91) (060-28-2318)
Harold R. Huhndorf (DOD 09/16/90) (526-16-7114)
Samuel Hunter (DOD 06/04/91) (452-48-5028)
Joseph D. Hurley (DOD 12/13/90) (126-01-2987)
Kenneth R. Itter (DOD 07/23/91) (537-14-3532)
Ivory Jackson (DOD 09/18/91) (437-01-5921)
Ervin M. Jackson, Jr. (DOD 09/12/91) (418-56-2643)
Kara C. Jenkins (DOD 08/01/90) (255-24-5119)
Richard D. Johns (DOD 05/17/92) (235-22-5602)
Herman R. Johnson (DOD 03/20/91) (437-70-2780)
Orville W. Johnson (DOD 06/12/92) (219-01-5952)
Simon J. Johnson (DOD 07/28/90) (262-22-7335)
Woodrow Johnson (DOD 01/04/91) (374-22-5210)
Rudolph E. Johnston (DOD 08/30/90) (459-03-3149)
H. B. Jones (DOD 02/03/92) (429-32-4740)
Hughie Jones, Jr. (DOD 09/27/91)(205-14-6417)

Thomas Jones, Jr. (DOD 09/07/91) (266-09-9216)
Carl C. Jorgensen (DOD 10/15/91) (437-14-3519)
Wilford Joseph (DOD 01/03/91) (460-10-2059)
Charles Khedoo (DOD 01/06/92) (113-20-0730)
Edward J. Kilford, Jr. (DOD 10/16/92) (543-01-2114)
Retis C. King (DOD 04/02/91) (235-36-5422)
Mark T. Kinto (DOD 04/13/91) (212-34-8864)
Elias A. Kirkland (DOD 08/19/90) (436-10-3650)
James U. Knowles (DOD 03/24/91) (077-12-9995)
Edward A. Kohl (DOD 12/15/90) (266-20-1051)
Norman P. Kottemann (DOD 09/08/90) (435-22-2809)
Richard Kowalski (DOD 08/06/90) (376-32-1438)
Michael Kozusko (DOD 04/05/92) (063-22-0826)
Edward J, Kramer (DOD 01/19/91) (153-01-1736)
Henry G. Lai (DOD 06/10/92) (556-26-8029)
Chris F. Larsen (DOD 12/20/91) (133-07-2413)
Linwood L. Lawton (DOD 09/03/90) (224-30-7935)
James D. Lewis (DOD 10/24/91) (282-24-3085)
Jason Llanis (DOD 01/13/92) (132-05-3504)
Luis Lockarno (DOD 01/30/91) (435-40-7639)
Andrew S. Lucien (DOD 06/17/92) (433-28-8529)
Thomas S. Maldonado (DOD 04/02/91) (050-05-9335)
Bobby D. Mangold (DOD 07/01/91) (234-42-7617)
Joseph M. Manini (DOD 01/26/91) (576-07-2471)
Eddy Markle (DOD 12/30/91) (576-12-0504)
Ramon Martinez Castro (DOD 10/23/90) (126-26-4403)
Michael P. Masek (DOD 08/31/92) (263-28-2050)
Richard H. Mawhorter (DOD 11/11/91) (293-16-0831)
John J. McCaffery (DOD 12/24/90) (568-28-5792)
Richard McCants (DOD 10/12/90) (417-12-2193>
John A. McCarville (DOD 11/28/90) (535-16-5271)
William R. McClintic (DOD 02/11/91) (559-24-4314)
William L. McCoy, Sr. (DOD 10/04/91) (227-32-4240)
Mack J. McGee, Jr. (DOD 09/28/90) (557-32-8969)
Roger E. McKenna (DOD 03/21/91) (559-22-8719)

Thomas H. McQuay (DOD 08/04/90) (263-13-1136)
Sidney Meaux (DOD 09/30/90) (094-12-0494)
David Medina, Sr. (DOD 04/13/91) (433-40-8220)
Walter P. Meisner (DOD 08/13/90) (570-12-3029)
Agathangelos G. Melissnaratos (DOD 10/24/90) (554-32-4895)
Oswaldo Meron (DOD 05/29/92) (063-22-8659)
Robert L. Michalscheck (DOD 09/14/92) (531-34-1109)
William A. Milchling (DOD 05/20/91) (213-12-8556)
Lewis Miller (DOD 01/23/91) (298-16-8102)
Merle V. Milton (DOD 01/18/91) (313-22-9467)
James B. Mitchell, Sr. (DOD 07/16/91) (254-22-9854)
Leroy N. Mobley (DOD 03/07/91) (488-18-1686)
Macedonio Montoya (DOD 08/16/91) (455-32-2195)
John E. Moore (DOD 04/21/91) (053-18-8142)
Charles I. Moore, Sr. (DOD 12/15/91) (261-20-8654)
John C. Moran (DOD 11/28/90) (428-24-8508)
Edward L. Morelock (DOD 02/14/91) (283-22-8720)
Henry H. Morris (DOD 09/17/91) (247-38-3132)
Clarence Morse, Jr. (DOD 09/05/90) (418-18-2827)
Theodore Murrah (DOD 01/14/93) (418-18-9069)
Bill J. Myers (DOD 05/03/91) (387-20-3231)
Joe M. Napier (DOD 09/04/91) (267-32-8498)
Robert E. Neal (DOD 12/07/90) (249-10-4845)
George R. Nelson (DOD 05/28/91) (387-24-6137)
Joe W. Norman (DOD 12/01/90) (238-20-8723)
Andres Nunez (DOD 08/16/91) (113-20-8839)
Ismael C. Nunez (DOD 05/13/92) (349-24-8134)
Leopoldo Ojeda Morales (DOD 12/07/90) (219-09-1008)
John Onga (DOD 02/03/91) (132-10-7932)
Bernard F. Overstreet (DOD 12/09/91) (421-07-8014)
Don C. Paedae, Jr. (DOD 03/15/92) (493-10-7027)
Augustus D. Palmer (DOD 07/05/91) (075-18-4643)
Joseph Papu (DOD 03/28/91) (576-14-6465)
James R. Parker (DOD 01/12/92) (425-36-9114)

Joseph A.C. Patenaude (DOD 10/17/91) (721-03-7033)
Felimon Peniaranda (DOD 02/18/91) (558-20-1271)
Joaquin Pereira (DOD 09/05/90) (155-16-9640)
Luis J. Perez (DOD 01/16/91) (467-26-7913)
Joseph P. Perrina (DOD 06/07/92) (103-12-9798)
Moses H. Perry, Jr. (DOD 03/22/91) (416-30-1942)
Eugene G. Peters (DOD 10/17/92) (398-10-5819)
Leroy L. Peters, Sr. (DOD 11/25/91) (219-10-4772)
Burl W. Prichard (DOD 10/08/90) (409-03-4583)
Charles C. Pritchard (DOD 09/14/92) (269-12-0495)
William H. Pritz (DOD 10/07/90) (545-22-8694)
Adriano Quinones Martinez (DOD 09/24/91) (582-03-4095)
Alpheus Rainey (DOD 07/11/91) (097-07-9491)
Jan Rani (DOD 12/20/90) (132-01-6912)
Herbert J. Reichert, Jr. (DOD 04/03/91) (213-26-3995)
Jose C. Reyes Maldonado (DOD 08/17/90) (092-12-1472)
Felipe M. Reyes, Sr. (DOD 11/10/91) (423-01-9125)
Marcus A. Reynoza (DOD 08/10/90) (566-18-8874)
William H. Rhone (DOD 06/07/91) (422-45-5407)
Jerome M. Rice (DOD 04/12/91) (421-16-6655)
James Q. Rice, Sr. (DOD 09/25/92) (229-16-0230)
Nathaniel F. Richard (DOD 12/06/91) (434-36-0282)
Emiliano Rios Toro (DOD 02/25/91) (133-01-9119)
Esteban Rivera Carreras (DOD 06/07/91) (083-26-0740)
Benjamin E. Robbins (DOD 02/16/92) (267-50-6431)
John M. Rockstroh (DOD 04/0791) (220-01-3026)
George Rodgers (DOD 05/30/91) (126-13-7815)
Louis Rodock (DOD 10/11/90) (097-14-4253)
Angel Rodriguez Martinez (DOD 03/25/92) (219-09-2760)
Malcolm L. Rogers (POD 08/23/90) (564-32-0095)
Winston W. Rumph (DOD 08/06/92) (250-01-18?8)
Leo A. Scheidt (DOD 01/09/92) (487-22-1531)
Prank Schmidt (DOD 07/31/90) (223-20-7616)
Richard F. Schuettner (DOD 08/26/92) (155-10-9879)
Emil H. Schultz (DOD 10/11/92) (137-10-9155)

Fitzgerald Segree (W D 07/26/91) (119-07-4660)
Leo Selico, Sr. (DOD 04/03/92) (439-26-3775)
Gustavo Serrano (DOD 10/01/90) (130-07-5356)
MacDonald Serrette (DOD 08/16/91) (416-34-0844)
Jerome A. Severe (DOD 01/01/93) (437-07-9286)
Joseph W. Shierlock (DOD 11/27/91) (249-16-4527)
Biliran O. Sierra (DOD 09/08/92) (533-26-2541)
Lawrence J. Silva (DOD 11/08/90) (019-18-2675)
Thomas Sims (DOD 02/08/91) (422-03-2297)
Pat J. Sing (DOD 06/23/92) (552-32-4382)
Walter J. Slade (DOD 10/22/90) (026-07-6005)
Joseph F. Smith (DOD 02/24/91) (052-12-8827)
Nelson Sotero Vazquez (DOD 05/17/91) (106-26-5860)
Joseph Souza (DOD 05/04/92) (027-20-2349)
Albert W. Spanraft (DOD 01/22/92) (355-12-0128)
Lanier Speed (DOD 11/18/90) (421-26-3024)
Homer Starling (DOD 01/02/95) (424-01-7089)
James C. Stewart (DOD 05/19/92) (422-05-9406)
John Stratidakis (DOD 08/13/91) (080-20-7376)
Floyal L. Suter (DOD 01/04/91) (443-34-4134)
William D. Swallows (DOD 08/11/92) (568-20-0242)
Joseph A. Tanguay (DOD 08/01/90) (059-24-0197)
Nels J. Tanula (DOD 08/27/91) (398-07-8514)
Joseph R. Taylor (DOD 08/03/90) (524-28-3524)
Earl H. Terry (DOD 05/26191) (286-18-6085)
Theodore M. Tetonis (DOD 08/07/90) (140-18-6340)
Eugene S. Thomas (DOD 06/05/91) (267-26-7809)
George E. Thompson (DOD 03/02/92) (552-22-1749)
Clyde D. Tibbs (DOD 12/13/90) (463-24-9737)
Heber C. Tolar (DOD 11/19/90) (553-14-8395)
Nicholas Torres Arieta (DOD 06/03/91) (100-12-2280)
William C. Traser (DOD 12/09/90) (223-03-9742)
Alphonse J. Tremer, Jr. (DOD 08/05/90) (416-18-1952)
Richard L. Trexler (DOD 03/05/92) (217-14-4868)
Arthur S. Turner (DOD 07/27/90) (545-28-4224)

Chris L. Turner (DOD 11/06/91) (452-54-3751)
John E. Ubl, Sr. (DOD 05/15/92) (297-07-3857)
Roy C. Uhl (DOD 01/31/92) (317-22-0988)
Henry Uribe (DOD 12/30/91) (569-30-4504)
Anneliese M. Valentine Domingo (DOD 03/03/92)
(078-26-1649)
Celestino Valverde (DOD 02/25/91) (453-18-1354)
Lawrence J. Vanderventer (DOD 04/21/91) (372-14-3531)
Constant S. Vandewouwer (DOD 08/16/91) (115-07-7206)
Bernie Vaughn (DOD 07/06/91) (223-18-2338)
Armindo Vidot (DOD 08/14/90) (189-24-5352)
Aquilino S. Villariza (DOD 01/04/91) (124-14-5077)
William G. Vogel (DOD 10/18/90) (064-16-0152)
Hans W. Wagner (DOD 09/02/91) (559-18-7960)
William M. Wagstaff (DOD 12/24/91) (086-16-3369)
George C. Walker (DOD 01/16/91) (230-22-3045)
Floyd W. Wallace (DOD 04/20/91) (217-18-3968)
Ward M. Wallace (DOD 12/22/91) (225-18-5674)
George L.A. Walrond, Sr. (DOD 07/10/91) (084-22-6986)
Carl L. Ward, Sr. (DOD 07/17/91) (413-09-4519)
Marceline I. Warden (DOD 02/07/91) (231-28-8848)
Bernard L. Weiss (DOD 12/12/91) 1375-40-9105)
Andrew W. Wells, Jr. (DOD 05/22/92) (266-05-0383)
Raymond Whaley, Jr. (DOD 10/05/92) (251-34-2891)
Joe Murry Wilkerson, Sr. (DOD 05/08/91) (421-16-6642)
Alease Williams (DOD 08/02/90) (429-03-6246)
Elmo Williams (DOD 10/11/91) (450-01-5054)
John F. Williams (DOD 09/10/91) (545-12-1825)
Raymond R. Williams (DOD 10/09/90) (263-14-5965)
Robert Williams (DOD 11/28/90) (536-16-1445)
Russell N. Williams (DOD 04/08/92) (129-14-3996)
Hulos A. Willie (DOD 02/08/91) (090-14-5906)
James Wilson (DOD 09/03/91) (436-26-4027)
Robert H. Witherspoon (DOD 08/18/90) (563-26-4008)
John Woodberry (DOD 09/11/91) (248-36-7840)

Enrique Zapata (DOD 07/06/91) (460-16-9723)
Joseph Zare (DOD 10/25/91) (155-12-2929)
Russell W. Zeller (DOD 11/22/91) (554-46-7834)

Plaintiffs (370 Decedents)

Civil No

v :

ACandS. Inc., ACMC f/k/a National Gypsum Company, Acme Brick Company, Acorn Iron & Supply Co., Allis-Chalmers Corporation, The Allpax Co. Inc., American Ship Building Co., Anchor Packing Co., Argo Intl. Corp., Armstrong World Industries, The Auburn Mfg. Co., Aurora Pump Division of General Signal Corp., Bethlehem Steel Corp., Bigelow-Liptak Corp., A. B. Boyd Co., Bryan Steam Corp., The Carborundum Co., CertainTeed Corp., Champion International, Chemseco, Coffin Pump, Inc., Coltec Industries, Inc., Alfred Conhagen, Inc., Crosby Steam & Valve Co., Crown, Cork & Seal Co., Inc., Dana Corp., The Darcoid Co. Inc., Donlee Technologies, Inc., Durabla Mfg. Co., Everlasting Valve Co., Excelsior, Inc., Fel-Pro Incorporated, Felt Products Incorporated, Fibreboard Corp., Flexitallic, Inc., Flintkote Co., GAF Corp., Gatke Corp., General Cable Co., General Refractories, Goodall Rubber Co., B. F. Goodrich, Goodyear Tire & Rubber Co., Goulds Pumps, Inc., A.P. Green Industries, Inc., Greene Tweed & Co., Hajoca Corp., Harbison-Walker Refractories Group, The Home Rubber Company, Indian Head Industries, Inc., Ingersoll-Dresser Pump, Ingersoll-Rand Corp., James Walker Mfg. Co., Janos Industrial Insulation Corp., John Crane Inc., La Favorite Industries, Inc., The Lunkenheimer Co., Melrath Gasket, Inc., Morrison Bros. Co., Mortell Company, Noland Company, North American Refractories Co., Norton Co.,

The Okonite Co., Owens-Corning Fiberglas Corp., Owens-Illinois, Inc., P P G Industries, Inc., Pecora Corp., Phoenix Speciality Manufacturing Co., Inc., Pilot Packing Co., Inc., Pittsburgh Corning Corporation, Plibrico Co., Preferred Utilities Mfg. Corp., Quaker Construction Products, Inc., Quaker Rubber Company, Quigley Co., Inc., Sherwin-Williams Co., Shook & Fletcher Insulation Co., Skinner Engine Company, Inc., T & N Industries Inc., Union Carbide Corporation, United States Gypsum Co., USX Corp., Vellumoid, Inc., Viking Pump, Inc., Warren Pumps, Inc., Zimmerman Packing & Mfg., Inc.

Defendants (93)

COMPLAINT

Plaintiffs say:

1. This Complaint is brought under Rule 20 of the Federal Rules of Civil Procedure and jurisdiction of this cause lies within the aegis of this Honorable Court by virtue of Article III, Section 2 of the Constitution of the United States, this cause being an admiralty and maritime claim, under the general admiralty and maritime law; and diversity of citizenship is asserted under 28 U.S.C. §1332, when applicable as to respective party Defendants in relation to each particular party plaintiff.

2. Plaintiffs plead in the alternative upon occurrence of a situation as stated below. Plaintiffs assert that this is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure, although here Plaintiffs rely on the diversity statute as a basis for maritime jurisdiction of the Court whereby each Plaintiff is alleged to be of a different

domiciliary than that of each Defendant, and thus a maritime cause is asserted to be tried to jury; but let it be known that in the event the fortuity of each diversity of citizenship of any plaintiff as to respective defendant should be evinced, then under such occasion this pleading contemplated as pro tanto the invocation of Rule 9(h) of Federal Rules of Civil Procedure as to such party defendant, reserving status quo as to all other defendants.

As an example of such fortuity where, unbeknownst to the pleader plaintiff X is of the same domicile and state citizenship as are defendants Y and Z, then as to those two defendants the Court alone under Rule 9(h) shall try all issues, but as to all other defendants, it remains a jury trial.

3. Plaintiff, Creighton E. Miller, Administrator of the Estates of Decedents, set forth herein, is a duly appointed representative of the respective estate by the Probate Court of the County of Cuyahoga, Cleveland, Ohio.

4. At all times relevant herein, Defendants designed, manufactured, sold or otherwise supplied for use of shipowners abroad vessels harmful toxins and carcinogens including asbestos and asbestos-containing products or machinery and equipment on which the asbestos products were placed as contemplated by and or otherwise for placement on vessels upon which Plaintiffs or Plaintiff's Decedents served during periods of time when the respective mariners as crewmen were exposed to their detriment to the afore-stated chemicals and products, suffering injury to their person or death of their being as the case may have resulted.

5. As a direct and proximate result of said exposure to asbestos products and asbestos-containing products, Plaintiffs or Plaintiff's Decedents suffered

traumatic affliction of anatomical disorder, structural changes, pulmonary diseases inclusive of which are asbestosis/ mesothelioma/lung cancer/pneumoconiosis/ chronic obstructive pulmonary disease/colon cancer/stomach cancer/rectal cancer/kidney cancer/pancreas cancer/pharynx cancer/brain cancer/other anatomical cancer, et cetera, either singularly or in combination thereof.

6. Each respective Defendant committed breach of duty to the Plaintiff-litigants by the negligent failure to reasonably adhere to safe standards of design and manufacture and failed to give warnings of the defects of the products that would result in detriment of the health exposure of human beings and further committed a breach of implied warranty of fitness of the respective products for their intended use.

7. Defendants at all times herein relevant committee acts and omissions constituting willful and wanton disregard for the safety of those to whom the asbestos would foreseeably be exposed with indifference, reckless disregard and gross negligent conduct, all to the detriment of persons so exposed including Plaintiffs or Plaintiff's Decedent herein, all of which amounts to a basis for punitive damages.

8. As a direct and proximate result of the negligent and gross negligent acts of Defendants and the breach of implied warranty aforesaid, Plaintiffs or Plaintiff's Decedents herein sustained damages as below stated, inter alia:

As to Plaintiffs:

a. loss of earnings and earning capacity, past and

future;

b. conscious pain and suffering, past and future;

c. exemplary and punitive damages;

d. any and all other compensatory damages as may be allowed upon proofs.

As to Plaintiff's Decedents:

a. loss of earnings and earning capacity during Plaintiff's Decedents' lifetime;

b. conscious pain and suffering;

c. loss of support;

d. loss of society and companionship suffered by the heirs and next of kin of Plaintiff's Decedents;

e. exemplary and punitive damages; and

f. any and all other compensatory damages as may be allowed upon proofs.

WHEREFORE, Plaintiff-litigants demand trial by jury or, in the alternative, by the Court when required, and judgment of an amount in excess of Fifty Thousand ($50,000.00) Dollars as to each Plaintiff against Defendants, jointly and severally, and appropriate costs in addition to punitive damages with respect to each Defendant, in an amount and denomination to be determined upon ascertaining during the pendency of this cause the net worth of each Defendant herein; and Plaintiff further with respect

to each Decedent, seeks such other further measures of relief as the Court may determine to be appropriate and just in the premises.

THE MARITIME ASBESTOSIS
LEGAL CLINIC, a division of THE
JAQUES ADMIRALTY LAW FIRM

BY: S/_____
LEONARD C. JAQUES
ALAN KELLMAN (#92442)
Attorney for Plaintiff-Litigants
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: July 26, 1993

Jury Demand

Plaintiff hereby demands trial by jury.

THE MARITIME ASBESTOSIS LEGAL
CLINIC, a division of THE JAQUES
ADMIRALTY LAW FIRM

BY: S/_____
LEONARD C. JAQUES
ALAN KELLMAN (#92442)
Attorney for Plaintiff-Litigants
1370 Penobscot Building
Detroit, MI 48226
(313) 961-1080

Dated: July 26, 1993